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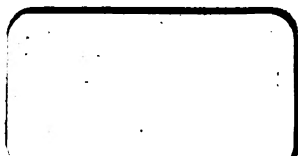
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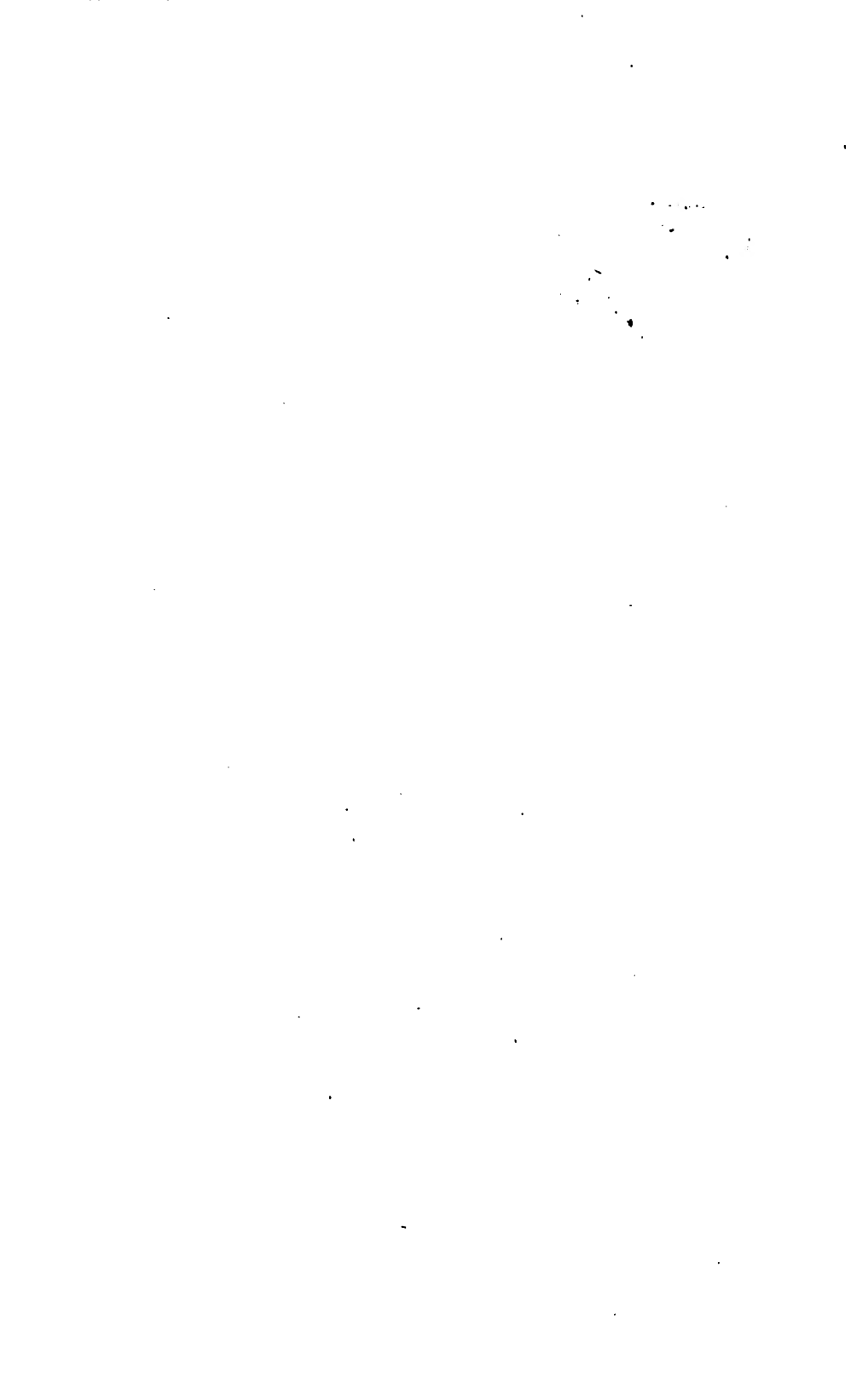
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LOWER-CANADA REPORTS.

2801

DÉCISIONS DES TRIBUNAUX

DU

BAS-CANADA.

REDACTEUR: M. LELIEVRE.

COLLABORATEURS A MONTREAL: MM. BEAUDRY ET ROBERTSON.

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**VOLUME XI.**  
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QUÉBEC:
IMPRIMÉ PAR AUGUSTIN COTÉ.
—
1861.

58,650

LOWER-CANADA REPORTS.

DÉCISIONS DES TRIBUNAUX DU BAS-CANADA.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 671. { PAIGE..... *Plaintiff.*
 { vs.
 { SAVARD..... *Defendant.*

Held :—1o. That the immovable property of the defendant may be seized at the same time as his moveables, but his moveables must be first sold.

2o. That where the return of the bailiff sets forth that the defendant has no moveables, proceedings to set aside this return must be taken before an opposition can be filed to set aside the seizure of the immovable property, on the ground that the moveables should be first seized and sold.

Jugé :—1o. Que la propriété immobilière d'un défendeur peut être saisie en même temps que ses meubles, mais ses meubles doivent être vendus d'abord.

2o. Que lorsque le retour de l'huissier énonce que le défendeur n'a pas de meubles, une procédure pour faire mettre de côté ce retour doit être adoptée avant qu'une opposition ne soit enfilée à la saisie de ses propriétés, immobilières fondée sur ce que ses meubles eussent dû être saisis et vendus d'abord.

Judgment rendered the 5th. October, 1860.

Execution having been sued out against the goods and chattels of the defendant, the bailiff made a return of *nulla bona*. A writ then issued in virtue of which his immoveables were seized. The defendant filed an opposition *afin d'annuler* to the seizure of his immoveables, alleging that prior to the issuing of the writ under which his immoveables were taken in execution he was in possession of moveable property which he specified in his opposition, and concluded that the seizure of his immoveables he set aside, his moveables not having been first seized and sold. The plaintiff demurred to the opposition, on the ground that it ought to have set forth the

value of the moveable effects alleged as being in the possession of the defendant ; and that previously to filing the opposition the defendant should have inscribed *en faux* against the return of the bailiff shewing that he, the defendant, had no moveable effects.

DUVAL, for plaintiff.—The return of the bailiff setting forth that the defendant has no moveables is conclusive so long as the defendant does not inscribe *en faux* against it ; and the defendant should have stated the value of the articles specified in the opposition which he pretends he had in his possession at the time of the issuing of the execution against his moveables, because, if they are of little value, the plaintiff is not bound to discuss them previously to selling his immoveable property (1).

PARKIN, for defendant. The moveables must be discussed before the plaintiff can proceed to the sale of the immoveables. It is not necessary to inscribe *en faux* against the return of the bailiff ; the affidavit of the party attached to his *opposition afin d'annuler* alleging all the facts therein contained to be true and well founded in fact and in law, is a sufficient contradiction to the return of the bailiff.

STUART, Justice.—All the property of a defendant, the immoveable as well as the moveable, may be seized at the same time, but the moveable property must be first sold. The opposition here seeks to set aside the seizure of the immoveable property, because the personal property has not been sold. Now the return of the bailiff shews that there is no personal property, and so long as no steps are taken to set aside this return, no ground of objection can be made to the seizure and sale of the immoveables. The opposition is therefore dismissed.

DUVAL and TASCHEREAU, for plaintiff.

ANDERSON and PARKIN, for defendant.

(1) 9 Lower Canada Reports, p. 33.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 631. { TALBOT..... Plaintiff.
 vs.
 { DONNELLY..... Defendant.

Held :—That an affidavit to hold to bail, which sets forth the essential allegations as required by the 12th. Vic. Cap. 42, in the disjunctive, instead of in the conjunctive form, is bad, and the *capias* must be quashed.

Jugé :—Qu'un affidavit pour *capias*, qui contient les allégations essentielles requises par la 12me. Vic. ch. 42, dans le disjonctif, au lieu d'être alléguées dans la forme conjonctive, ne peut valoir, et le *capias* doit être annulé.

Judgment rendered the 2nd November, 1860.

The affidavit upon which the writ of *capias* issued, alleged, that the defendant “ est sur le point de laisser im-
 “ médiatement la Province avec l'intention de frauder ses
 “ créanciers en général *ou* le déposant en particulier, et
 “ que le défendeur a caché *ou* est sur le point de cacher
 “ ses biens,” &c ; et que sans le bénéfice d'un *capias ad*
 “ *respondendum* contre le corps du dit défendeur, lui le dé-
 “ posant perdra sa créance, *ou* souffrira du dommage.”

VANNOVOUS, for defendant, moved to quash the *capias* on the ground that the affidavit was vague and uncertain, inasmuch as it did not state positively whom the defendant intended to defraud, whether his creditors generally or the plaintiff in particular ; nor whether the defendant had secreted or was about to secrete his property, that it merely set forth that he had done so, or was about to do it, but this was not an allegation asserting the one fact or the other, it amounted to no allegation at all.

TALBOT, for plaintiff, *contra*.

STUART, Justice.—All the allegations required by the 12th. Vic. cap. 42, in an affidavit to arrest the body of a defendant, are stated in the affidavit here, in the negative form ; it merely says that the defendant intends doing so and so, or something else ; that without the be-

nefit of a writ of *capias* the plaintiff will lose his debt, or something else. Now all these essential allegations must be in the conjunctive and not in the disjunctive form ; in a case where the liberty of the subject is concerned the language must be clear and positive, and not merely in the negative as it is here.

Capias quashed.

TALBOT, for plaintiff.

VANNOVOUS, for defendant.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Assistant-Judge.

No. 261.	{	McDONALD.....	<i>Plaintiff.</i>
			vs.
		McLEAN.....	<i>Defendant.</i>
			and
		WILSON.....	<i>Opposant.</i>
		and	
		DOYLE.....	<i>Adjudicataire.</i>

Held :—That a rule for a *contrainte par corps* against a woman *sous puissance de mari*, though *séparée de biens* from her husband, will be rejected, unless notice of the rule be given to the husband.

Jugé :—Qu'une règle pour *contrainte par corps* contre une femme *sous puissance de mari*, quoique *séparée de biens*, sera rejetée, à moins que signification de la règle ne soit faite au mari.

The opposant obtained a rule for a *contrainte par corps* against the *adjudicataire*, Elizabeth Doyle, wife of Edward T. Charlton, and separated from her husband as to property, for non payment of the difference of the purchase money of the property sold at her *folle enchère*.

PARKIN, for *adjudicataire*, contended, that no attachment or *contrainte par corps* could issue against the body of a woman.

TASCHEREAU, Juge.—J'ai déjà maintenue qu'une motion ou règle pour *contrainte par corps* contre la personne d'une femme sous puissance de mari, quoique séparée de biens, ne pouvait être accordée sans avis au mari (1); et considérant que le mari de l'adjudicataire dans la présente cause n'a pas été notifié de l'application pour la *contrainte par corps*, le règle est renvoyée.

STUART and MURPHY, for opposant.

ANDERSON and PARKIN, for adjudicataire.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chef,
AYLWIN, DUVAL, MEREDITH et MONDELET Juges.

JARRY..... Appelante.
et

THE TRUST AND LOAN COMPANY..... Intimés.

Jugé :—1o. Que dans le cas d'un contrat de mariage avec stipulation d'ameublement, et cependant clause de réalisation au cas de renonciation par la femme à la communauté, la femme séparée de biens ne peut réclamer comme reprise la jouissance du prix d'aliénation d'un immeuble donné pendant la communauté par la mère à une fille adoptée et à son époux, avec condition d'inaliénabilité et pour servir d'aliments.

2o. Que telle donation ne forme pas un propre à la femme.

3o. Que le rapport de praticien qui en a accordé la reprise à la femme et le jugement homologuant ce rapport ne lient aucunement les tiers qui peuvent contester la réclamation de la femme.

4o. Que, dans l'espèce, les intimés avaient droit d'être colloqués préférentiellement à l'appelante.

Held :—1o. That in the case of a marriage contract with a covenant of *ameublement*, and a clause of *realisation* in the event of renunciation of the community by the wife, the wife *séparée de biens* cannot claim by way of *reprise* the enjoyment of the proceeds of the sale of an immovable property given by the mother to her adopted daughter and her husband during the community with condition that such property could not be seized but would serve to procure *aliments*.

2o. That the property given by such donation does not become a *propre* of the wife.

3o. That the report of the notary which awarded the same to the wife and the judgment homologating such report is not binding upon third parties contesting the claim of the wife.

4o. That, in the case submitted, the respondents had a right to be collocated in preference to the appellant.

Jugement rendu le 1er décembre, 1860.

L'appelante ayant obtenu jugement en séparation de biens contre Simon Lacombe, son mari, fit saisir les im-

(1) 10 Lower Canada Reports, p. 457, Cloutier vs. Cloutier.

meubles de ce dernier, et nommément un terrain situé sur la rue Ste. Catherine, en la cité de Montréal.

La vente de ce lot réalisa la somme de £525 4 7, que l'appelante, comme adjudicataire, retint entre ses mains, et que le prothonotaire fut appelé à distribuer suivant les créances apparentes au dossier.

Au nombre des réclamations étaient celle de l'appelante pour ses reprises matrimoniales ; celle d'un nommé Maxime Lacombe, tuteur élu à certaine substitution créée en faveur des enfants de l'appelante avec son mari ; un nommé Joseph Lemai dit Delorme, qui avait une hypothèque de garantie sur l'immeuble vendu ; et les intimés pour prêt d'argent fait au défendeur pour rebâtir les édifices qui avaient existé sur ce terrain et avaient été détruits par l'incendie de juillet, 1854, réclamant une préférence sur toutes autres hypothèques.

Pour bien comprendre le rapport de distribution, il est nécessaire d'entrer dans le détail de la réclamation de l'appelante.

Par son contrat de mariage reçu devant notaires, le 15 janvier, 1828, et enregistré le 11 juillet, 1844, il fut stipulé qu'il y aurait communauté de biens entre elle et Lacombe ; ameublement de tous les biens à eux appartenant, et qui pourraient leur échoir à l'avenir ; et cependant droit de reprendre par l'appelante, lors de la dissolution de la communauté et en cas de renonciation à icelle, tout ce qu'elle y aurait apporté ou lui serait advenu, pendant icelle, tant par succession, *donations*, legs *qu'autrement*, et ce franchement et quittement.

Par acte du 14 mai, 1829, Barron, notaire, Marie Louise David, veuve de feu Frs. Bleignier dit Jarry, fit donation entrevifs au dit Simon Lacombe et Rosalie Jarry, (l'appelante) fille adoptive de la donatrice, Lacombe acceptant tant pour sa femme alors mineure que pour les en-

fants qui pourraient naître de leur mariage, c'est à savoir, à Simon Lacombe et à Rosalie Jarry, de la jouissance et usufruit, et à leurs enfants, de la pleine propriété d'une terre décrite dans cet acte, " pour de la dite terre et autres " objets y mentionnés en jouir par le dit Simon Lacombe " et Rosalie Jarry, à titre de constitut et précaire leur vie " durant et du survivant d'eux, sans que la dite jouissance, " et usufruit puisse être arrêtée et saisie pour aucunes " dettes des dits Simon Lacombe et son épouse, voulant " et entendant la dite donataire pourvoir à leur logement, " nourriture et entretien leur vie durant et du survivant " d'eux, et les mettre en état d'élever, nourrir et entretenir " les enfants qui pourraient naître de leur mariage, et après " le décès du survivant des dits Lacombe et son épouse, " les dites terres et dépendances, le tout retournera et ap- " partiendra aux enfants nés et à naître du dit mariage, " pour en disposer par eux en pleine propriété, et à défaut " d'enfants, à ceux qui se trouveront alors être les plus " proches parents de la donatrice."

Par un autre acte du 21 octobre, 1842, la dite David, donna à Lacombe et à Rosalie Jarry, *ses gendre et fille*, certains effets et deniers y mentionnés, moyennant une rente viagère.

Le huit mai, 1846, sur requête présentée par Pierre Lacombe, tuteur à la substitution contenue en la donation du 14 mai, 1829, et de Lacombe et sa femme, ils furent autorisés en justice à vendre la terre mentionnée et décrite en cette donation, pour une somme pas moindre que 9000 livres ancien cours, dont les deniers seraient " employés " en achat d'héritage situés en la cité de Montréal, au " profit des enfants des dits Simon Lacombe et Rosalie " Bleignier dite Jarry son épouse, étant bien entendu que " les dits deniers ne sortiront des mains de l'acquéreur de " la dite terre que pour entrer en celles du vendeur ou des " vendeurs des héritages qui doivent être acquis par le dit " Simon Lacombe et sa femme conjointement avec le dit

“ tuteur à la substitution, et que dans le contrat de cette acquisition, il sera fait déclaration de l'origine des dits deniers, afin que les héritages ainsi acquis....servent de remploi et tiennent nature de propre par subrogation aux enfants du dit Simon Lacombe et sa femme,.... et cette acquisition ne sera néanmoins valable qu'après qu'elle aura été confirmée et ratifiée en justice, par un avis de parents des dits enfants.”

Sur cette autorisation, la terre fut mise aux enchères et adjugée à un nommé James Buchanan pour 9000 livres, et le contrat lui en fut passé devant Labadie, notaire, le 27 février, 1847. Dans cet acte, néanmoins, on s'écarta des conditions fixées par la Cour, Lacombe et sa femme reçurent de l'acquéreur 5000 livres, et les 4000 livres restant étaient stipulées payables à époques fixes, aux dits Simon Lacombe et sa femme, qui, *pour assurer la garantie de la dite vente*, obligèrent, affectèrent et hypothéquèrent spécialement, jusqu'à concurrence de 9000 livres, plusieurs terrains, et entre autres celui vendu en cette cause, au moyen de laquelle hypothèque Buchanan dispensa Lacombe et sa femme de l'emploi des deniers ordonné par le juge.

Le praticien nommé pour constater les reprises matrimoniales de l'appelante sur sa renonciation à la communauté, lui attribua : 1o. La somme de 9000 livres, prix de la vente à Buchanan, dont l'appelante ne devait cependant avoir que la jouissance ; 2o. Tous les effets en nature donnés par l'acte de donation du 21 octobre, 1842 ; 3o. Une somme de 5500 livres montant des deniers donnés à l'appelante par la dite David, et que Simon Lacombe avait employés à payer un immeuble qu'il avait acheté de Frs. Lebeuf dit Laflamme ; 4o. 860 livres pour le quart des arrérages de la rente payable à la dite David par un nommé Antoine Voyer, et transporté à l'appelante par l'acte du 21 octobre, 1842 ; 5o. Enfin la somme de 300 livres par une jument donnée par la dite David pour l'appelante, en

paiement d'un lopin de terre acheté par le dit Simon Lacombe d'un nommé Pierre Lapointe : formant un total de 15660 livres.

Ce rapport du praticien fut homologué par la Cour, et l'appelante en réclamait le paiement en faisant remonter son hypothèque à la date du contrat de Mariage.

De son côté, l'intervenant, Maxime Lacombe, le présent tuteur à la substitution créée par la donation du 14 mai, 1829, réclamait au nom de la substitution, en vertu de l'hypothèque sur le lot de terre vendu en cette cause, contenue en l'acte du 27 février, 1847, le montant des 9000 livres prix stipulé en ce dernier acte.

L'opposant Joseph Lemai dit Delorme, successeur de James Buchanan, dans la possession de l'immeuble vendu par l'acte du 27 février, 1847, réclamait, pour sûreté du trouble auquel il était exposé de la part des substitués, le montant des dites 9000 livres, ou cautions suffisantes contre ce trouble.

L'opposition des intimés était fondée sur deux obligations que leur avait consenti Simon Lacombe, avec la Corporation de Montréal, en date du 13 avril, 1853, devant Doucet, notaire, et enregistrées le même jour ; et les conclusions demandaient la collocation *par privilège et suivant la date des dites obligations*.

Le rapport de distribution préparé par le protonotaire colloqua utilement l'appelante comme suit :

“ 50. Vu l'opposition faite par la demanderesse, se fondant sur le jugement rendu en cette cause, le 28 mai, 1859, homologuant le rapport du praticien pour constater les reprises matrimoniales de la dite demanderesse, et nommément cette partie qui a rapport à une somme de 9000 livres ancien cours, prix d'un immeuble vendu par un nommé Pierre Lacombe, es-qualité y mentionnée. avec le défen-

deur et la demanderesse, à un nommé James Buchanan, par acte devant Labadie et confrère, notaires, en date du 27 février, 1847, et dont le dit défendeur a reçu le montant, duquel immeuble la demanderesse et le défendeur n'avaient que la jouissance à charge de substitution en faveur de leurs enfants, ou autres personnes y indiquées, à défaut d'enfants, et pour sûreté de laquelle somme le dit défendeur et la demanderesse hypothéquèrent divers immeubles parmi lesquels se trouvent celui dont les deniers sont distribués par les présentes ; vu aussi l'opposition faite par l'opposant Joseph Lemai dit Delorme, comme étant au droit du dit James Buchanan et ayant acquis de lui le susdit immeuble, réclamant une sûreté contre tout trouble auquel il pourrait être exposé à raison de la substitution ci-dessus mentionnée et du paiement qu'en a reçu le défendeur : Sur les deniers restés entre les mains de la demanderesse comme adjudicataire de l'immeuble à elle adjugé en cette cause, elle gardera entre ses mains, comme partie du dit prix, la susdite somme de 9000 livres égale à £375 0 du cours actuel, dont elle aura la jouissance sa vie durant, pour ensuite être et appartenir aux enfants issus de son mariage avec le défendeur, ou autres personnes qui peuvent ou pourront y avoir droit en vertu de la donation consentie par Marie Louise David, veuve de feu Frs. Bleignier dit Jarry au défendeur, acceptant tant pour lui que pour la demanderesse, le dit acte reçu le 14 mai 1829, devant Thos. Barron et son confrère, notaires, £375 0 0.

6o. La dite demanderesse opposante gardera de plus sur son dit prix d'adjudication, en extinction de ses autres reprises matrimoniales portées au dit jugement du 28 mai, 1859, et se montant à la somme de £277 10 £94 18 5½

7o. Il sera payé à MM. Bondy et Fauteux, avocats de la dite demanderesse, et demandeurs par distraction de frais sur les jugements obtenus en cette cause par la demanderesse contre le défendeur £27 2 5½

Plus, frais d'opposition de la dite		
demanderesse,	3 11 8	
au protonotaire	11 8	
	<hr/>	£31 5 9½

80. Au dit opposant Joseph Le-		
mai, dit Delorme ses frais d'oppo-		
sition à L. Bélanger, Ecr.	3 11 8	
au protonotaire,	11 8	
	<hr/>	£4 3 4

La première collocation était ainsi faite à raison de la substitution de la somme de 9000 livres, et de la garantie assurée à l'acheteur James Buchanan et son représentant l'opposant Jos. Lemai dit Delorme, en vertu de l'hypothèque créée sur le lot vendu en cette cause par l'acte du 27 février, 1847.

Delorme avait incontestablement droit à cette garantie, car le danger d'éviction était à peu près certain, à moins que la somme de 9000 livres ne fut assurée aux substitués cidesus mentionnés ; si Delorme eût touché cette somme, l'intérêt en était payable à Simon Lacombe et à l'appelante, comme aliments insaisissables. D'un autre côté, le tuteur à la substitution avait également droit de demander ce principal de 9000 livres en en payant l'intérêt au dit Simon Lacombe et à l'appelante, leur vie durant, ou du moins exiger caution que ce principal serait payé à l'ouverture de la substitution. La collocation cinquième telle que préparée conciliait tous ces différents intérêts. La somme de 9000 livres en restant entre les mains de l'appelante comme adjudicataire, assurait par droit de bailleur de fonds le paiement des 9000 livres aux substitués, et mettait Lemai dit Delorme à l'abri de tout trouble, tandis que les aliments insaisissables de Simon Lacombe et sa femme se trouvaient également remplis.

Quant à la sixième collocation elle était uniquement basée sur le rapport du praticien qui avait l'autorité de la

sentence d'homologation qui devait servir de règle jusqu'à preuve contraire.

Les intimés contestèrent les collocations 5e, 6e et 7e, alléguant que l'appelante n'avait droit à aucune des reprises ci-dessus mentionnées à raison de l'ameublement porté dans son contrat de mariage, et que le rapport du praticien ainsi que l'homologation d'icelui ne devaient avoir aucun effet ; ils semblent n'avoir attaché aucune importance à la clause de réalisation contenue au contrat de mariage ; ils niaient de plus l'existence des reprises, et alléguaient qu'en vertu de l'acte de la 16me. Vic., ch. 25, ils avaient un privilège sur tous autres créanciers pour le recouvrement des deniers par eux avancés au défendeur Simon Lacombe, et qui avaient servi à construire les bâtisses qui sont érigées sur le terrain vendu en cette cause.

Leurs conclusions tendaient à faire déclarer que l'appelante n'avait aucun droit d'hypothèque sur le terrain vendu en cette cause ; qu'elle n'avait même aucun droit de reprise tel que porté au dit rapport de praticien ; et partant qu'il fut déclaré que la compagnie de dépôt et de prêt du Haut-Canada, avait et a droit d'être, comme créancier privilégié et hypothécaire, colloquée et payée par préférence et à l'exclusion de l'appelante ; et conséquemment qu'il fut ordonné que le rapport de distribution en cette cause sera modifié et changé en conséquence.

Cette contestation ne fut signifiée qu'à l'appelante, qui seule fut appelée à y répondre et seule lia contestation avec les intimés, Maxime Lacombe le tuteur à la substitution, ainsi que Lemai dit Delorme, n'y ayant été aucunement parties.

Le 29 février, 1860, la Cour Supérieure rendit le jugement qui suit :

“ The Court, having heard the parties by their respec-

tive counsel upon the contestation raised by the opposants, The Trust and Loan Company of Upper Canada, to the opposition filed by the said opposant Rosalie Jarry and the collocations to her allowed and to her attorneys Messrs. Bondy and Fauteux, for costs *par distraction* of the judgment by her obtained in this cause against the said defendant her husband, *en séparations de biens*, and of the homologation of the report of the praticien thereby ; the said collocations made by the fifth, sixth and seventh items of the draft or order of distribution in this cause, of the proceeds of the real estate sold by the sheriff of this district by him returned before this Court, and submitted for distribution in this cause by the draft or order aforesaid ; having examined the proceedings, evidence of record and deliberated : Considering that the said Dame Rosalie Jarry has no mortgage right or claim in and upon the said real estate, or the proceeds thereof, for the sums of money allowed to her in and by the said fifth and sixth items of collocations, nor for the costs allowed in the seventh item of collocation either for herself or her said attorneys, *par distraction de dépens* on the said judgments ; and considering that the said opposants and contestants, The Trust and Loan Company of Upper Canada have a right to be collocated in the said distribution upon the said proceeds of the said real estate ; doth maintain the said contestation with costs of the same against the said Dame Rosalie Jarry, and doth order and adjudge that the said draft or order of judgment of distribution be corrected and amended by striking out the said fifth, sixth and seventh items of collocations so made in favor of the said Dame Rosalie Jarry and the said Messrs. Bondy and Fauteux her said attorneys for distraction &c.

L'appelante qui s'est pourvue en appel n'a obtenu qu'un jugement de confirmation dont le motivé porte qu'il n'y a pas d'erreur dans le jugement dont est appel. Le tuteur à la substitution n'était pas partie à l'appel non plus que

l'acquéreur de la propriété substituée et leurs réclamations et les pièces produites par eux n'ont pas été transmises avec le dossier. (1)

BONDY et FAUTEUX, pour l'appelante.

JUDAH H., pour l'intimée.

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCAEREAU, Juge

No. 45. { LAMBERT..... Demandeur.
vs.
LEFRANÇOIS..... Défendeur.

Jugé :—Qu'un bail peut-être rescindé faute par le locateur d'avoir pourvu de lieux d'aisance la maison louée, quand par suite de cette absence, les prémisses sont devenues insalubres.

Held :—That a lease may be rescinded in default of the premises leased having been provided by the lessor with a privy when, from the want of it, such premises have become unwholesome.

Jugement rendu le 8 décembre 1860.

Cette action fut portée en vertu de la 18e Victoria ch. 108, sec. 3, sous sec. 3.

Le demandeur par sa déclaration représentait que la partie de maison qu'il occupait en qualité de locataire du défendeur, était devenue insalubre et inhabitable pour deux raisons, savoir : parce qu'un dalleau destiné à la décharge des eaux sales et passant près de la fenêtre de l'étage occupé par le demandeur avait été converti en conduit ou vuidange de matières fécales, et parce que le défendeur depuis le bail avait laissé exposés et découverts d'anciens lieux d'aisance ci-devant à l'usage de la maison. Le demandeur alléguait de plus que le défendeur avait complètement omis et négligé de remplir les obligations qui par la loi incombait aux locataires, le tout malgré un protêt préalablement servi au défendeur pour faire cesser cet état de choses. Et le demandeur concluait à la rescision du bail avec dépens.

(1) Par l'acte 16 Vic., ch. 77 : Les intimés avaient un privilège spécial sur les bâties construites avec les deniers qu'ils prêtaient aux incendiés de 1852 à Montréal.

Le défendeur répondit à cette déclaration par une défense aux fonds en fait, et une exception péremptoire en droit perpétuelle, basée sur ce que dans le bail le demandeur s'était déclaré satisfait et content des prémisses pour les avoir occupées comme locataire antérieurement, et les occupait encore lors de la passation du bail, ajoutant que le dalleau dont se plaignait le demandeur avait toujours été employé à l'usage auquel il était employé alors, et que ce n'était que tout récemment que le demandeur avait songé à s'en plaindre.

La contestation fut liée sur ces deux plaidoyers, et des témoins furent entendus sur enquête faite par les deux parties.

Jugement.—“ Vu le bail en cette cause, la plaidoirie et la preuve faite ; considérant que la partie de maison louée par le défendeur au demandeur est très insalubre, et par conséquent inhabitable, et cela, par suite de ce que cette maison n'est pas pourvue suivant la loi de lieux d'aisances, et que les autres locataires de la maison sont forcés de se servir d'un dalleau communiquant du haut en bas de cette maison, et passant près des fenêtres des appartements occupés par le demandeur, pour y jeter toutes sortes d'immondices, et surtout des matières fécales ; et considérant qu'une telle pratique est en violation directe des règlements de saine police, et qu'il est prouvé clairement que l'odeur insupportable qui existe dans la partie de cette maison occupée par le demandeur provient de la présence de ce dalleau ; la cour déclare que le demandeur a droit de se plaindre de cet état de choses, et est justifiable à demander la résiliation du bail cité en sa déclaration en cette cause ; et en conséquence déclare le bail susdit rescindé à toutes fins que de droit, et condamne le défendeur aux dépens.

CANNON et CASGRAIN, pour le demandeur.

BELLEAU et JOLICOEUR, pour le défendeur.

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, J. T., Juge S. C. S.

No. 306. { GLACKEMEYER..... Demandeur.
 vs.
 LE MAIRE, LES CONSEILLERS ET CITOYENS DE LA CITÉ DE QUÉBEC.. Défendeurs.
 et
 LAGUEUX,..... Intervenant.

Jugé :—1o. Que, dans l'espèce, les termes enfants alors vivants, comprennent les petits enfants, descendant en ligne directe de la testatrice, et que par droit de représentation les dits petits enfants tiennent directement de leur bis-aïeule, et non de leur mère, leur droit au legs de la propriété de l'immeuble par eux réclamé.

2o. Que les lettres de ratification n'ont pour effet que de purger les hypothèques, sans autrement fortifier le titre d'acquisition dont la ratification est demandée, lequel, nonobstant telle ratification, reste avec toutes ses défauts et ses vices.

Held :—1o. That, in the case submitted, the terms children still living, comprehend the grand children descendants en ligne directe of the testatrix, and that by right of representation the said grand children hold directly under their great grand-mother, and not from their mother, their right to the legacy of the immovable property by them claimed.

2o. That the only effect of judgments of confirmation is to do away with mortgages, without in any manner fortifying the title deed the ratification of which is demanded, which deed, notwithstanding such ratification, remains with all its imperfections.

Jugement rendu le 29me. Décembre, 1860.

Les faits de la cause apparaissent suffisamment des observations suivantes :

TASCHEREAU, J. T. Juge :—Par son testament du 26 janvier, 1816, devant Planté, notaire, Cécile Maranda, veuve de François Griault, donna et légua à Cécile Griault, sa fille, et à Etienne C. Lagueux, mari de cette dernière, l'usufruit et jouissance, leur vie durant, de l'emplacement réclamé par le demandeur en cette cause, et la propriété aux enfants de la dite Cécile Griault et du dit Etienne C. Lagueux, pour être partagée également entre eux. Les usufruitiers prirent possession de leur legs et en jouirent jusqu'à leur mort respective, la testatrice étant décédée le 14 juin, 1819. Du mariage des dits Etienne C. Lagueux et Cécile Griault sont nés trois enfants, savoir : Joseph Lagueux, Eouier, avocat, Cécile Lagueux, épouse de feu Jean Olivier Bru-

net, et Henriette Lagueux, femme d'Edouard Glackmeyer, Ecr. N. P.—Etienne C. Lagueux, meurt le 3 août, 1842, et sa femme, Cécile Griault, le 5 septembre, 1845.

Henriette Lagueux, meurt le 19 mai, 1833, laissant issus de son mariage avec le dit Ed. Glackmeyer, cinq enfants, et entr'autres le demandeur.

Lors de la mort de Cécile Griault, savoir le 5 septembre, 1845, tous ses enfants vivaient, à l'exception de madame Glackmeyer qui était décédée le 19 mai, 1833, comme on l'a vu, et des cinq enfants du mariage de la dite dame Glackmeyer tous étaient vivants à sa mort, excepté celui appelé Denis Marc Glackmeyer qui était mort avant sa mère.

La déclaration du demandeur, qui renferme une demande au pétitoire du tiers-indivis d'un immeuble y désigné, allègue que les quatre enfants survivants du mariage d'Edouard Glackmeyer, (petits enfants de Cécile Griault) sont compris dans le legs que leur bisaïeule, Cécile Maranda, a fait de cet immeuble à ses petits enfants; qu'à la mort de Cécile Griault, le 5 septembre, 1845, les enfants Glackmeyer étaient propriétaires pour un tiers dans cet emplacement, par indivis avec leur tante, madame Brunet, et leur oncle Jos. Lagueux.

La déclaration allègue de plus, que le demandeur est cessionnaire des parts de ses trois frères dans le dit emplacement, en vertu d'un acte de cession, en date du 8 septembre, 1857, exécuté devant Mtre. Defoy, notaire, et conclut à ce que les défendeurs soient tenus de lui livrer le tiers indivis du dit immeuble, avec £1000 de fruits et revenus, et conclut au partage par licitation.

Les défendeurs, après avoir comparu par leur procureur en cette cause, ont fait défaut de plaider à l'action, mais leurs intérêts sont représentés par dame Cécile Adélaïde Lagueux, veuve Brunet, une des enfants de Cécile Griault,

laquelle intervient dans l'action, et par son intervention allègue :—1o. Que lors du décès de sa mère, qui est aussi la grand'mère du demandeur et de ses frères, deux de ses enfants seuls vivaient, savoir, elle, madame Brunet, et Jos. Lagueux, et que madame Glackemeyer, mère du demandeur, était morte avant sa mère, et que cette dernière (madame Glackemeyer) n'avait acquis aucun droit dans l'immeuble, vû qu'elle était décédée avant l'ouverture du legs, et qu'en conséquence les enfants de la dite dame Glackemeyer n'avaient eu aucun droit au legs en question, et qu'elle, madame Brunet, et Joseph Lagueux y avaient eu seuls droit. 2o. Que par la mort de Cécile Maranda, ses petits enfants, y inclus la mère du demandeur, avaient été saisis de la propriété, et que le demandeur et ses frères à la mort de leur mère, comme ses héritiers, étaient devenus saisis de sa succession, dans laquelle était le tiers du dit immeuble, et que les dits enfants avaient cédé leur droit à la succession de leur mère et grand'mère maternelle, à Edouard Glackemeyer, leur père, suivant acte devant Louis Prévost, notaire, le 12 février, 1851, et que, quant au demandeur, cette cession avait eu lieu verbalement ou par acte non découvert.

L'Intervenante allègue que M. Ed. Glackemeyer et l'intervenante étant les propriétaires par indivis de cet immeuble, l'ont vendu aux défendeurs, suivant acte de vente en date du 24 janvier, 1853, pardevant Defoy, notaire ; que les défendeurs ont demandé et obtenu des lettres de ratification de leurs titres d'acquisition du dit immeuble ; qu'elle, l'intervenante, a acquis la prescription de dix ans et de trente ans, et que le demandeur en cette cause n'était qu'un prête-nom au profit de son père, Edouard Glackemeyer, et conclut au renvoi de l'action pour la moitié par elle vendue aux défendeurs. L'intervenante a plaidé à l'action du demandeur par une exception péremptoire en droit perpétuelle tous les mêmes chefs que comprend son intervention.

L'autre vendeur, M. Ed. Glackmeyer, par une simple requête filée en la cause, a reconnu son obligation de ga-

rantir les défendeurs comme leur vendeur, et demande acte de ce qu'il se tient responsable envers les défendeurs de toutes les conséquences qui peuvent résulter de l'action du demandeur.

Les parties ont fait une enquête et filé une admission de faits, à l'effet de constater : 1o. Que le 24 janvier, 1853, l'immeuble valait en totalité £1600. 2o. Que les revenus de l'immeuble, depuis le 5 septembre, 1845, au 1er février, 1853, ont été de £529 3 7, dont il doit être déduit pour réparations, assurances et cotisations la somme de £150, dont moitié contribué par l'intervenante, laissant une balance nette de revenus de £379 3 4. 3o. Que du 1er février, 1853, les revenus de l'immeuble devront être calculés sur la valeur de l'immeuble, £1600, à 6 p. 100.

Il s'élève en cette cause les questions suivante :

1o. Les enfants issus du mariage d'Ed. Glackemeyer avec Henriette Lagueux, peuvent-ils prendre, par représentation de leur mère, décédée, le legs fait par leur bisaïeule, Cécile Maranda, à ses petits enfants vivants à la mort du dernier de leur père et mère, Et. C. Lagueux et Cécile Griault, étant prouvé que la dite Henriette Lagueux est décédée avant l'ouverture du dit legs, et sont-ils compris dans ce legs ?

2o. Les enfants Glackemeyer, y compris le demandeur, ont-ils cédé et transporté à leur père, Edouard Glackemeyer, leurs droits au dit legs, par les actes filés de record et invoqués par l'intervenante ?

3o. La prescription invoquée par l'intervenante est-elle légalement prouvée ?

4o. Quel effet a eu en faveur du titre des défendeurs l'obtention des lettres de ratification qui peuvent lui avoir été accordées par cette Cour ?

5o. Le demandeur n'est-il qu'un prête-nom en cette

l'usufruitière, ce qui ne fait que treize ans à venir à l'institution de l'action : or, l'intervenante ne produit pas d'autre titre de propriété que celui qu'elle peut dériver de l'interprétation en sa faveur du fait qu'elle était seule vivante avec Joseph Lagueux, des petits enfants de Cécile Maranda, et comme la Cour a jugé et interprété la question de droit contre elle, il s'ensuit qu'elle n'a aucun titre pour appuyer sa prescription de treize ans, et encore cette troisième question doit-elle être résolue contrairement aux vues de l'intervenante.

40. La quatrième question se résout par le seul exposé que les lettres de ratification n'ont pour effet que de purger les hypothèques, sans aucunement fortifier le titre d'acquisition qui, nonobstant la ratification, reste avec toutes ses déféctuosités et tous ses vices.

50. Rien dans cette cause ne prouve que le demandeur ne soit qu'un prête-nom en faveur de son père, ce qui dispense la Cour de se prononcer sur l'effet qu'aurait produit dans la cause la preuve de ce fait.

60. Il ne reste plus, qu'à considérer quel jugement la Cour doit prononcer, toutes les questions soulevées étant résolues d'une manière favorable au demandeur, qui du reste a prouvé les allégations importantes de sa déclaration. Je dois dire que les défendeurs doivent rendre au demandeur la possession et jouissance du tiers indivis de l'immeuble en question en cette cause aux termes de la déclaration, avec les fruits et revenus depuis leur acte d'acquisition, savoir depuis le 14 janvier, 1853, à raison de £32 0 0 par année, ordonnant une expertise pour la valeur de la maison, etc., etc., etc.

Le jugement est conçu en ces termes :

La Cour, etc.... Considérant que Dame Cécile Maranda, veuve de feu François Griaault dit Larivière, par son testament solennel fait et reçu à Québec, le vingt six

janvier, mil huit cent seize, pardevant Mtre. Joseph Planté, et confrère, notaires publics, donna et légua à sa fille, Cécile Griault dite Larivière, et à Etienne Claude Lagueux, mari de cette dernière, l'usufruit et jouissance leur vie durant de l'emplacement désigné en la déclaration du demandeur, savoir : " l'emplacement, maison et dépendances à elle appartenant, situés en la Basse-Ville de " Québec, etc... et légua par le même testament la propriété du dit immeuble aux enfants de la dite Gécile Griault dite Larivière, et du dit Etienne Claude Lagueux, qui seraient vivants au décès du dernier des susdits usufruitiers : Considérant que la dite testatrice est décédée le ou vers le quatorze juin, mil huit cent dix-neuf, sans avoir révoqué le dit testament, et que du mariage des dits Etienne Claude Lagueux et Cécile Griault dite Larivière, il est né trois enfants, savoir : Joseph Lagueux, Ecuier, avocat, Cécile Adélaïde Lagueux, femme Brunet, intervenante en cette cause, et Henriette Lagueux, femme d'Edouard Glackemeyer, mère du demandeur ; que cette dernière est décédée le ou vers le dix-neuf mai, mil huit cent trente trois, avant l'ouverture en sa faveur du legs en propriété d'un tiers du dit immeuble, attendu que ses père et mère, Etienne Claude Lagueux et Cécile Griault dite Larivière usufruitiers susdits ne sont décédés, le premier, que le ou vers le trois août, mil huit cent quarante deux, et la seconde que le ou vers le cinq septembre, mil huit cent quarante cinq : et considérant que la dite Henriette Lagueux a laissé de son mariage avec le dit Edouard Glackemeyer quatre enfants, lesquels étaient vivants lors de l'ouverture du legs en propriété du dit immeuble, et sont encore vivants, savoir : le demandeur, Edouard Claude Glackemeyer, Ecuier, notaire, Henri Romuald Glackemeyer, Ecuier, avocat, et Alfred Marc Glackemeyer, Gentilhomme, et qu'en loi ces enfants, par représentation de leur mère, ont droit chacun pour un quart au tiers de l'immeuble en question, et qu'ils tiennent ce droit directement de leur bisaïeule, la dite Cécile Maranda, et non de

leur mère : Considérant que par l'acte de cession ou transport fait et passé à Québec, le dix-huit septembre, mil huit cent cinquante sept, par devant Mtre. Louis Prévost et confrère, notaires publics, le demandeur a acquis de ses frères susnommés tous et chacuns leurs droits et prétentions au legs susdit, et aux fruits et revenus du dit immeuble, depuis l'ouverture du legs, et qu'il n'a pas été prouvé par l'intervenante, Dame Cécile Adélaïde Lagueux, que le demandeur et ses dits frères aient en aucun temps cédé et transporté à leur père, Edouard Glackemeyer, les dits droits et prétentions, vu que les seuls actes relatifs à ces prétendus cessions et transports ne font mention que des droits des dits enfants dans les successions respectives du dit Etienne Claude-Lagueux, Cécile Griault dite Larivière, et de la dite Henriette Lagueux ; que, de plus, la prescription invoquée par l'intervenante au moyen d'une possession de dix ans et de trente ans d'une moitié indivise du dit immeuble à l'encontre de la réclamation du demandeur n'est pas légalement prouvée, et que d'ailleurs cette prescription de trente ans ne pouvait courir contre les enfants susdits qui étaient mineurs, et que celle de dix ans n'est fondée sur aucun titre ; que de plus l'effet de l'obtention d'une sentence de ratification du titre des défendeurs, qui porte date du vingt quatre janvier, mil huit cent cinquante trois, n'a été que de purger les droits hypothécaires sur le dit immeuble, et nullement de fortifier le dit titre, et de purger le dit immeuble de toutes réclamations à la propriété d'icelui : Considérant qu'il n'est pas prouvé en cette cause que le demandeur ne soit qu'un prête-nom en faveur de son père, Edouard Glackemeyer ; et considérant enfin que le demandeur a prouvé sa demande, et que le dit immeuble est admis valoir annuellement en totalité la somme de quatre-vingt seize louis, courant, savoir, depuis le premier février, mil huit cent cinquante trois, jusqu'au jour de la restitution du dit immeuble, et que l'intervenante a complètement failli de prouver et maintenir en loi les allégations de son intervention et de son exception : La Cour renvoie la dite in-

tervention avec dépens, et déclare que le demandeur, tant en son propre nom que comme cessionnaire de ses frères susmentionnés, est le seul vrai et légitime propriétaire du tiers indivis au total de l'immeuble réclamé sur les défendeurs en cette cause ; que les défendeurs, qui en sont en possession, seront tenus sous quinze jours de la signification de la présente sentence, de se désister de la possession du dit tiers indivis appartenant au demandeur, et à le lui remettre avec les fruits et revenus depuis le premier jour de février, mil huit cent cinquante trois, sur le pied de trente deux louis courant par année, formant jusqu'à ce jour la somme de deux cent cinquante trois louis courant, que cette Cour condamne les défendeurs à payer au demandeur avec intérêt de la date de cette sentence ; et vu que les défendeurs ont démoli la maison et dépendances érigées sur le dit immeuble, et ont par là diminué la valeur du dit immeuble d'une manière considérable, la Cour ordonne que par des experts dont les parties conviendront sous quinze jours, sinon nommés d'office par un juge de cette Cour siégeant en Cour, ou en vacance, à la demande d'une des parties, et par un tiers expert qui sera nommé de la même manière, il sera constaté quelle serait la valeur moyenne de la dite maison et des dites dépendances depuis le premier jour de février, mil huit cent cinquante trois, jusqu'à ce jour, si la dite maison et les dites dépendances n'eussent pas été démolies par les défendeurs, pour par les dits experts faire leur rapport par écrit sans délai, et accompagnant icelui des témoignages des témoins que la Cour leur permet d'examiner s'ils le jugent à propos pour les fins de la justice, avec droit aux dits experts d'assermenter les dits témoins, pour être adjugé plus tard sur icelui rapport par cette Cour. Vu de plus l'alternative accordée par la déclaration du demandeur aux défendeurs de payer au demandeur la somme de mille louis courant, pour valeur du dit tiers du dit immeuble, et des fruits et revenus d'icelui jusqu'au trente octobre, mil huit cent cinquante huit, acte est par le présent accordé aux défendeurs du droit

qu'ils ont d'exercer cette alternative en payant au demandeur la dite somme de mille louis, avec intérêt à compter du trente octobre, mil huit cent cinquante huit, ce qu'ils seront tenus d'opter et d'en signifier leur choix au demandeur sous huit jours à compter de la signification de la présente sentence, à la charge par le demandeur de passer un titre valide, translatif de propriété du dit tiers d'immeuble en faveur des défendeurs ; sinon, et les défendeurs ne voulant pas ou ne signifiant pas par écrit leur intention de profiter de l'alternative susdite, la Cour permet au demandeur de procéder au partage et à la licitation du dit immeuble, suivant la loi, après avoir constaté l'indivisibilité du dit immeuble ; et réserve au demandeur le droit de prendre à cet égard ses conclusions supplétoires tel et ainsi qu'il avisera, et la Cour condamne les défendeurs au paiement des frais de la présente action, sauf leur recours pour iceux contre l'intervenante Cécile Adélaïde Laguenx, et contre Edouard Glackemeyer, de Québec, Ecuier, notaire.

LELIÈVRE, pour le demandeur.

BAILLARGÉ, pour les défendeurs.

TESSIER, pour l'intervenante.

QUEEN'S BENCH, }
 APPEAL SIDE. }

DISTRICT OF QUEBEC.

Before :—Sir L. H. LaFontaine, Bart., C. J., AYLWIN,
 DUVAL, MEREDITH and MONDELET Justices,

NOAD, *et al.*, *Appellants.*

and

LAMPSON, *Respondent.* (1)

Held :—1o. That promissory notes signed by the debtor, and payable to the creditor's order, do not, if dishonored at maturity, effect a novation of the debt for the payment of which they are given, if the intention to novate be not clearly expressed by the creditor at the time of their reception.

2o. That the words *dont quittance*, in a deed of sale, do not express any intention to novate under such circumstances.

3o. That the vendor of a chattel sold, for part of the price of which he has received the vendee's promissory notes, payable to his order, is, if any of such promissory notes be dishonored at maturity, privileged, on production of such promissory notes, upon the proceeds of the chattel sold in his debtor's possession under a writ of execution, for that portion of the original price represented by such promissory note or notes so dishonored and produced.

4o. That neither the exercise by the vendee of rights of property over the article sold, nor the making of repairs thereto, will defeat the privilege of the vendor, so long as the identity of the article can be established.

Jugé.—1o. Que des billets promissaires signés par le débiteur, et payables à l'ordre du créancier, n'opèrent pas, s'ils ne sont payés à l'échéance, une novation de la dette en paiement de laquelle ils ont été donnés, si l'intention de faire novation n'est clairement exprimée par le créancier lors de leur réception.

2o. Que les mots *dont quittance*, dans un contrat de vente, n'expriment pas dans telles circonstances l'intention de faire novation.

3o. Que le vendeur d'une chose, pour parti du prix de laquelle il a reçu les billets promissaires de l'acheteur, payables à ordre, à un privilège si aucuns des dits billets ne sont pas payés à échéance, sur le produit de la vente judiciaire de la chose vendue en la possession du débiteur, sur production de tels billets, pour cette portion du prix représenté par tel billet ou billets ainsi produits et non payés.

4o. Que ni l'exercice par l'acquéreur du droit de propriété sur la chose, ni le fait qu'il a réparé cette chose ne détruiront le privilège du vendeur, tant que l'identité de l'objet peut être constatée.

Judgment rendered the 17th. December, 1860.

This case came before the Superior Court for its decision upon the claim of an unpaid vendor to receive, by privilege, as such vendor, the sum of \$1760.29 cents out of the pro-

(1) Noad *et al.* and Lampson were opposants in the Court below in the cause No. 1886 wherein Adams was plaintiff, and Hunter, *et al.* defendants.

ceeds of the sale, by the sheriff, of the chattel belonging to the defendant J. J. Nesbitt, which had been originally sold to him by the unpaid vendor, Lampson, the respondent.

On the 16th, February, 1858, the respondent, William Lampson, by deed before Lemoine, and colleague, notaries, sold to the defendant, J. J. Nesbitt, a certain floating-dock, which, on the 29th. October, 1859, was sold by the sheriff, as the property of Nesbitt. The sale from Lampson to Nesbitt was for £4,000, on account of which sum Lampson acknowledged to have received from Nesbitt £1192,—the balance being paid, partly by two notes of H. J. Noad & Co., the respondents, payable to the order of J. J. Nesbitt, and by him endorsed, and the residue by two of Nesbitt's own promissory notes payable to Lampson's order, at long and distant periods, one of which was afterwards made payable at a shorter period and then renewed, but all of which notes so made by Nesbitt were dishonored and protested for non payment, leaving the sum of \$1760.29, equal to £440 1 5, being the aggregate amount of the two promissory notes, due and owing by Nesbitt to Lampson on the price of the floating-dock, for which sum Lampson prayed to be collocated by privilege as unpaid vendor, on the proceeds of the floating-dock.

Lampson's claim was contested by Noad *et al*, opposants *afin de conserver*. In their peremptory exception, the sale by Lampson, and the making, signing and delivery of the several promissory notes by Nesbitt were set forth in detail, but it was alleged therein that those promissory notes were taken and received in full payment of the price of the floating-dock, and that thereby a novation was operated of the debt originally due to Lampson, and, consequently, that his privilege as unpaid vendor had never any existence. It also alleged that, by an instrument

passed before Bignell and colleague, notaries, on the 15th. February, 1858, (being the day previous to the sale by Lampson to Nesbitt,) Nesbitt borrowed from H. J. Noad & Co., a sum of £1500, and by way of security for the repayment of that sum pledged the floating-dock to them.

It was in evidence that, a day or two afterwards (the 17th. February,) one of the firm of Noad & Co., Mr. Jeffrey, accompanied by a Mr. Grant, their book-keeper, and Mr. Bignell, N. P., went to Diamond Harbor, where they found Nesbitt, and then,—they all standing at some distance, but in sight of the dock,—Nesbitt said, speaking to Mr. Jeffrey : “ There is the floating-dock, I deliver it to you in pledge, as promised.” The parties then left without more to do. It was likewise alleged by Noad *et al.*, in their peremptory exception, that Nesbitt “ from and since the day first aforesaid, (the 17th. February, 1858,) hath used the said floating-dock in the prosecution of his trade and business.”

No opposition to the seizure and sale by the sheriff of the floating-dock was at any time made by or on behalf of Noad *et al.*, as pledgees thereof. No change whatever took place respecting the dock. Nesbitt deposed that after “ February, 1858, repairs were made by him to the said dock ; the repairs to the said dock were occasioned by the moorings of the dock having been either broken or cast adrift, during the night-time, in a gale of wind in the high spring tides, which altered the position of the dock, and she grounded in a critical position. I repaired the dock on that occasion. I added a good deal of iron to the said floating-dock and caulked it a good deal ; there was some timber of the said dock broken up but it was not replaced.”

The foregoing statements sufficiently shew the leading facts of the case.

BOWEN, Chief Justice, in rendering the judgment of

the Superior Court, appealed from, said the questions of law to be decided were :—First. — Whether the taking of the promissory notes in question, by Lampson, operated as a novation of the debt, and barred him from the privilege of the unpaid vendor of the said floating-dock. Secondly.—Whether the circumstance of Nesbitt having made some trifling repairs to the dock destroyed its identity so as to exclude Lampson from the privilege which he claimed as unpaid vendor thereof.

“ La novation est la substitution d’une nouvelle dette à une ancienne. L’ancienne est éteinte par la nouvelle qui est contractée en sa place ; c’est pourquoi la novation est comptée parmi les manières dont s’éteignent les obligations.” (1)

No. 585.—“ Il résulte de la définition que nous avons donnée de la novation, qu’il ne peut y avoir de novation qu’il n’y ait eu deux dettes contractées, dont l’une soit éteinte par l’autre qui lui est substituée. De là il suit que si la dette dont on veut faire novation par un autre engagement, est une dette conditionnelle, la novation ne pourra avoir lieu que lorsque la condition existera. C’est pourquoi si la condition vient à manquer, il n’y aura point de novation, parcequ’il n’y aura point en de première dette à laquelle la nouvelle ait pu être substituée.”

In this case, the condition upon which the notes were accepted in payment, was that they should be paid at maturity ; being dishonored the condition never was accomplished, consequently there was no novation of the original debt or anything equivalent to payment ; it remained in its full force, with all its privileges attached.

No. 594. “ Il faut pour la novation une volonté de la faire dans la personne du créancier, ou dans celle qui a pouvoir de lui, ou qualité pour faire la novation en sa place...Personne ne doit facilement être présumée abdi-

(1) Pothier, Oblig. No. 581.

“ quer les droits qui lui appartiennent. C’est pourquoi
 “ la novation renfermant une abdication que le créancier
 “ fait de la première créance à laquelle la seconde est
 “ substituée, cette novation ne doit pas facilement se pré-
 “ sumer et les parties doivent s’en expliquer.”

No. 596.—“ Si le nouvel engagement, fait sans l’inter-
 “ vention d’une nouvelle personne, ne contient rien de dif-
 “ férent du premier, il est évident que ce nouvel enga-
 “ gement est inutilement contracté.”

No. 199.—“ Au surplus, cette décision de la Cour de
 “ Paris ne peut se soutenir. Il est faux que dans l’espèce
 “ il y eut novation, et que le vendeur eût été payé dans le
 “ sens de la loi. Quoiqu’il y ait des arrêts assez nombreux
 “ qui ont décidé que la dation de billets opère une libé-
 “ ration et conduit à fin le contrat de vente, on ne doit pas
 “ les suivre, et il faut se ranger à l’opinion beaucoup plus
 “ juridique qui veut que le paiement en billets soit toujours
 “ subordonné à la condition de l’encaissement. C’est ce
 “ qu’ont décidé plusieurs arrêts, parmi lesquels je citerai
 “ un arrêt de la Cour de Nancy, du 4 janvier, 1827, rendu
 “ après une discussion approfondie, et sur mes conclusions
 “ conformes. Il est clair que le créancier qui reçoit un
 “ pareil paiement n’entend donner quittance qu’à la charge
 “ que les billets seront payés à l’échéance. La novation
 “ ne se suppose pas ; et pour y arriver, il ne faut pas sur-
 “ tout fausser la pensée des parties contractantes.” (1)

The foregoing authorities sufficiently establish that in this case no novation of the debt due by Nesbitt to Lampson was operated by the acceptance of the promissory notes in question ; and an authority can be shewn where the original purchaser of a chattel, not having paid his vendor, sold to another who paid him, which second purchaser also sold to a third person who paid him, the original vendor was, nevertheless, maintained in his privi-

(1) *Troplong Privilèges et Hypothèques* No. 199 bis :— *Ess' Leading Cases—Sale*, p. 80—*Miles vs. Gorton*.

lege and allowed to revendicate the chattel then in question. Upon these principles and the weight of the foregoing authorities, I hold that Lampson is not debarred from the exercise of his privilege upon the proceeds of the floating-dock sold in this cause.

I now proceed to examine the second question presenting itself for consideration. It was urged by Noad *et al.*, that the repairs made by Nesbitt constituted such an exercise of property by him over the dock as to defeat Lampson's claim, and the case of Têtu *et al.* vs. Fairchild *et al.*, and divers opposants, (1) was cited by them as being in point. There the question presenting itself had reference to the identity of goods which had been sold by the plaintiffs to the defendants, and though those goods had been taken out of the bales, had been placed on the shelves of the defendants' shop, for sale, and had been mixed up with other goods belonging to them bought from other parties, the plaintiffs sought to exercise the privilege claimed in this case. Their demand was dismissed on the ground that the goods over which such a privilege is claimed must be, in the language of the old writers "sous cap et queue." In that case it was almost impossible to identify any portion of the goods : here, on the contrary, the dock is easily identified, no alteration of any consequence whatever having been made to it. On a careful examination of the principles laid down in that case, it will be seen that the judgment about to be rendered in this case is by them fully supported. The case of the Union Building Society vs. Russell, (2) also maintains the view taken of this case. I refer, however, to one case in Trop-long, where a party selling an ingot of silver has a privilege upon the dishes made out of it, because they can be restored and again be made into an ingot of silver.—So long as identity can be established, so long does the privilege exist. (3) Under these circumstances I have come to

(1) 6 L. C. Rep., p. 289.

(2) 7 L. C. Rep., p. 374.

(3) Trop-long, Priv. et Hyp., No. 113 notes.

the conclusion that Lampson's opposition is well founded, and that he is entitled to the privilege which he claims.

It was from this judgment that Noad *et al.*, appealed.

AYLWIN, Justice, dissenting :—I concur in the opinion of the majority of the Court to some extent, but differ on some points. The first question is as to whether the right of pledge exists, and I think it manifestly does not. The contract with the appellants bears date the day before the sale to Nesbitt by Lampson, and two days afterwards a view is taken of the dock by one of the appellants. But the dock was never in their actual possession as pledgees, or under their control ; it remained in the possession of Nesbitt who went to considerable expense in repairing it. If the appellants are deprived of their pledge, they have no one but themselves to blame ; no privilege was acquired by them subsequent to Lampson's. As to the words *dont quittance* in the deed of sale, I am satisfied they apply as well to the notes as to the cash. Lampson knew that Nesbitt had applied to Noad *et al.* to obtain cash on the dock, and that any loan for repairs would of necessity confer a privilege. In interpreting the article of the Custom, we must take care not to give greater rights to the unpaid vendor than he had under the Roman law. Mere delivery without payment of the price does not vest the property in the vendee ; nor are the vendor's privileges to be carried out indefinitely, but are subject to great restrictions, as where the goods are not "*sous balles et sous cordes*," or have been placed upon shelves with other goods, so that they cannot be identified. In *Tétu vs. Fairchild* that was the decision, and I approve of it ; for, in view of the state of the law in Lower Canada, it is necessary that some restriction should be placed on the exercise of the unpaid vendor's privilege. In this case it is evident the appellants' privilege as pledgees, ceased long since in favor of the unpaid vendor, and that by the words *dont quittance* the respondent relinquished his claim and made it a mere per-

sonal debt. Neither of the parties has, therefore, any privilege, and they should be collocated concurrently *au marc la livre*.

MEREDITH, Justice.—I think the judgment of the Court below is, in principle, right.

The french authorities establish, and the Courts here have invariably held, that the taking of a promissory note on account of a debt, does not cause a novation of such debt ; and this on the ground that a promissory note is considered to be received subject to the condition of payment, *subordonné à la condition de l'encaissement*. (1)

The use of the dock by Nesbitt, and the changes (such as they were) made in it, did not defeat the privilege of the unpaid vendor ; because they did not affect the identity of the thing sold, or interfere, in any material degree, with the means of establishing that identity.

Nor do I think, even assuming that the dock was legally pledged by Nesbitt to the appellants with the knowledge of the respondent, that the creation of that right of pledge defeated the privilege of the unpaid vendor.

Even if the right of the pledgee had continued in full force until the moment of the sale, the right of the unpaid vendor might still have been exercised, if the amount levied had been more than enough to satisfy the pledgee ; because, even in that case, the property pledged would have had to be seized and sold as belonging to the pledger, (2) and the case would thus come within the words of the 177th. article of the Custom :

“ Si la chose se trouve saisie sur le débiteur par un autre créancier il peut empêcher la vente, et est préféré sur la chose aux autres créanciers.”

(1) See in addition to the authorities cited by respondent.—2. Rev. de Leg. p. 126 and authorities there cited

Also 1. vol. L. C. Rep. p. 250 and authorities there cited ; same point decided at Montreal, 1840, *Blackadder vs. Benoit*.

(2) *Troplong*, Gage No 468. Vol. 19. p. 420 :—*Pigeau*, 1. Vol. p. 660.

Ferrière in his commentary on this article puts the question : “ Si le vendeur à terme est préféré au créancier de l'acheteur à qui la chose vendue a été baillée en gage ? ” Bacquet is of opinion that in such a case the unpaid vendor ought to have the preference ; whereas Ferrière and Brodeau think the pledgee ought to be preferred to the unpaid vendor ; but none of the commentators on the article in question are of opinion, as contended by the appellants, that the pledging of a thing purchased on credit, is the exercise of such a right of property in it, as to defeat the privilege of the unpaid vendor.

The fact that Lampson knew of the intention of Nesbitt to pledge the floating dock is unimportant ; because Lampson having given credit for the price, could not, even had he been so disposed, have prevented Nesbitt from pledging the thing purchased. Nesbitt could have sold the floating dock, without the consent of Lampson, and *à fortiori* he could pledge it.

Being then, as I am, of opinion that Lampson's privilege as unpaid vendor has not been defeated either by novation or otherwise, and that the appellants, if they ever had the right of pledge upon the floating dock in question, had lost that right before the time of the sale in this cause, I think the judgment of the Court below right, as to the matters really in controversy between the parties ; but as the learned counsel for the appellants has pointed out, an error has crept into the judgment as to a matter of detail.

The floating dock and appurtenances were sold for £4000. Other things described in the deed as the “ half stock,” were sold for £189 11 10.

The balance remaining due upon the whole is £442 1 10.

Assuming, as I think we must do, that the payments made on account amounting to £3749 11 10, are to be imputed rateably on the sum of £4000, and on the sum of £189 11 10, already mentioned, the balance now remain-

ing due on the £4000, would be £420 19, and it is for that sum only that the respondent has a right to be collo-
cated by privilege on the proceeds of the floating dock.

To this extent the judgment of the Court below will have to be modified.

Judgment confirmed with costs of the Court below against the appellants. Costs of this Court divided between the parties.

VANNOVUS, for appellants.

CAMPBELL and KERR, for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :— Sir L. H. LA FONTAINE, Bart., Juge-en-Chef,
AYLWIN, DUVAL, MEREDITH, et MONDELET, Juges.

LACOMBE, *Appelant.*
et

FLETCHER, *Intimé.*

Jugé :—Que l'acheteur d'un héritage qui a accepté le transport de son prix d'achat, ne peut opposer, à l'encontre de la réclamation du cessionnaire, la demande en délaissement portée contre lui, tant qu'il n'y a pas dépouillement judiciaire et éviction complète.

Held :—That the purchaser of immoveable property who has accepted an assignment of the price of sale, cannot set up, in answer to the claim of the assignee, a demand *en délaissement* made against him, so long as he has not been judicially dispossessed.

Jugement rendu le 1^{er} décembre, 1860.

Le 17 février, 1851, l'appelant vendit à Benjamin Séguin une terre située à Rigaud. Le 21 février, 1857, Séguin, ne pouvant payer le prix convenu, rétrocéda la terre aux conditions, 10. par le rétrocédant de demeurer quitte envers le retrocessionnaire de la balance qui restait due à ce dernier, et 20. en outre pour la somme de £50,

dont £12 10 payés comptant par l'appelant, qui promet payer la balance de £37 10, pour l'acquit de Séguin, à l'intimé, à qui l'appelant consentit une reconnaissance devant les mêmes notaires qui avaient reçu l'acte de rétrocession.

L'appelant, poursuivi plus tard en déclaration d'hypothèque pour dettes créées par Séguin, fit sa déclaration de délaissement.

Poursuivi ensuite par l'intimé pour le recouvrement de la somme de £37 10, il lui opposa, et les hypothèques pour lesquelles il avait été poursuivi, et le délaissement qu'il avait fait.

L'intimé répondit que ce délaissement ne pouvait lui être opposé vu l'engagement personnel de l'appelant à son égard. Que, d'ailleurs, l'appelant avait reçu de Séguin, avant la rétrocession, une somme de 5487 liv. 16 sols, qui devait suffire pour mettre l'appelant en état d'acquitter cette poursuite hypothécaire.

Le 15 novembre, 1859, la Cour Supérieure, à Montréal, prononça le jugement qui suit :

La Cour, etc.... Considérant que les conventions et stipulations du dit acte de rétrocession... passé entre le dit défendeur (l'appelant) et le dit Benjamin Séguin, et mentionnées dans la dite exception péremptoire du dit défendeur filée en cette cause, ne peuvent affecter la réclamation du demandeur, ni lui le dit demandeur qui n'était pas partie au dit acte, ni annuler ni mettre de côté l'engagement personnel du défendeur par lui consenti au dit demandeur, par et en vertu de son dit billet ou reconnaissance en date du 21 février, 1857, mentionné dans la déclaration du demandeur, et pour le montant duquel le défendeur est poursuivi dans cette action; et considérant que le dit défendeur ne s'est aucunement relevé de son dit engagement, condamne le défendeur à payer au demandeur la dite somme de £37 10 etc.

L'appelant porta sa cause en appel et le jugement de la Cour Supérieure fut confirmé, " considérant qu'il n'y a " pas erreur dans le jugement dont est appel ; " le Juge-en-Chef, en rendant le jugement déclara comme motifs de cette confirmation que l'appelant était demeuré en possession de l'immeuble, nonobstant sa déclaration de délaissement qui n'avait été suivie d'aucune autre procédure, pas même de la nomination d'un curateur ; et que le titre de l'hypothèque même n'avait pas été produit.

Le juge Mondelet observa qu'il faut dépouillement juridique suivant l'opinion de Toullier, vol. 3, no. 319.

DORION, DORION et SÉNÉCAL, pour l'appelant.

MOREAU, OUMET et MORIN, pour l'intimé.

No. 2011. { MCCARTHY, *et al.*, Demandeurs.
vs.
SÉNÉCAL Défendeur.
et
SÉNÉCAL Demandeur en garantie.
vs.
BONNEAU, *et al.* Défendeurs en garantie.

The defendant in an hypothecary action brought an action *en garnie* against four only out of six of his vendors, liable under their deed of sale for a *garantie* against the claim of the principal plaintiff; the action *en garantie* was discontinued as to one of the defendants *en garantie*.

Held :—10. That under the deed of sale each co-vendor sold only his own share, or *portion héréditaire*, in the succession of his ancestor, and was only liable to the extent of such share in the action *en garantie*, the obligation of *garantis* being divisible *quo ad damnationem*, and the three defendants *en garantie* were condemned to indemnify the plaintiff *en garantie* to the extent of one half of the hypothecary debt, being one sixth for each defendant, with costs of the principal demand, and costs on the demand *en garantie* only up to the filing of the plea, inasmuch as the defendants offered by their plea to allow judgment to go against them for one half of the sum mentioned in the principal action.

2o. That the *hypothèque* is indivisible in so far as respects the immoveable hypothecated.

Les faits de la cause apparaissent suffisamment des observations suivantes.

BERTHELOT, Juge :— Les demandeurs, comme représentants et légataires de feu Moses Hart, du district des Trois - Rivières, poursuivent par action hypothécaire le défendeur principal, sur un jugement obtenu par le dit Moses Hart contre François Denant, affectant hypothécairement un immeuble que ce dernier vendit à feu Léonard

Bonneau, père et beau-père des défendeurs en garantie, et possédé au jour de l'action principale par le sieur Pierre Sénecal.

Ce dernier a acquis par acte du 19 mars, 1860, reçu devant M. Lanctot et confrères, notaires, de :

1o. Léandre Bonneau, 2o. Norbert Bonneau, 3o. Moïse Livernois pour Suzanne Bonneau, son épouse, 4o. Joseph Piédalue, agissant pour ses trois enfants mineurs issus de son mariage avec Eulalie Bonneau, et 5o. pour Ermine Bonneau épouse d'Hubert Lefèvre ses beaufrère et belle-sœur, et 6o. Philomène Bonneau, épouse de Jérémie Lambert, ses beaufrère et belle-sœur, pour lesquels il se fit fort et par qui il promit faire ratifier.

Les susnommés se disent vendeurs du dit immeuble comme leur appartenant du chef et de la succession des feus Léonard Bonneau et Suzanne Robidaux leurs père et mère, pour le prix de 2400 livres, faisant 400 livres pour chacune des dites six parts.

Le défendeur principal étant ainsi poursuivi hypothécairement, n'a appelé en garantie que quatre de ses vendeurs, savoir : Léonard Bonneau, Norbert Bonneau, Moïse Livernois, et sa femme, Suzanne Bonneau, et Joseph Piédalue. Et il a conclu contre eux à une condamnation solidaire pour toute la demande hypothécaire. L'action a été discontinuée quant à Piédalue, sur exception préliminaire par lui plaidée.

Les trois autres défendeurs ont plaidé qu'ils n'avaient pas vendu solidairement, et que n'ayant vendu que comme héritiers et représentants de leurs père et mère, ils n'avaient vendu que chacun leur part dans l'immeuble, de même qu'ils ne devaient avoir que chacun un sixième du prix, c'est-à-dire 400 livres, ainsi qu'exprimé au contrat, et que, par conséquent, le recours en garantie devait se diviser entre eux.

Ils ont en outre plaidé et prétendu que les demandeurs principaux ne leur ayant jamais fait connaître, avant l'ac-

tion hypothécaire intentée, qu'ils étaient les légataires et représentants du dit feu Moses Hart, et que n'ayant jamais eu de domicile élu dans le district de Montréal pour recevoir le paiement de leur créance, ils ne devaient pas être reçus dans leur demande, au moins quant aux frais.

Mais en cela les défendeurs ont tort, parce que les demandeurs ont succédé à feu Moses Hart à titre universel, et que ce dernier avait eu son domicile en dehors du district de Montréal, au lieu même où résidaient les demandeurs au temps où la créance a été constatée, et reconnue existant au profit du dit feu Moses Hart à qui elle était due, et que par conséquent il n'y avait eu aucun changement de domicile de la part du créancier, ou du lieu où le paiement devait ou pouvait être fait.

Sur la question de la divisibilité ou non-divisibilité de l'exercice du recours en garantie, contre plusieurs vendeurs, ou les héritiers et représentants du même vendeur, les auteurs sont assez partagés.

Ils paraissent l'être moins ou plutôt s'accordent assez à dire, que bien que le principe de l'indivisibilité de l'obligation semble être incontestable, lorsqu'il s'agit de la tradition de la chose, il en doit être autrement lorsqu'il s'agit du recours à être exercé pour, ou par remboursement d'une condamnation pécuniaire qui a été subie par l'acquéreur pour la dette des co-vendeurs ou des co-héritiers du vendeur.

Toute la doctrine sur cette question me semble clairement résumée par *Duranton* au No. 264 du volume 11ième, où il parle de l'obligation indivisible *quoad petitionem*, mais divisible *quoad executionem*, et par cela même divisible *quoad damnationem*. Tel est le cas où un vendeur " qui doit la garantie à l'acheteur vient à mourir laissant " plusieurs héritiers, et que l'acheteur est troublé par un " tiers dans sa jouissance. Cet acheteur peut les mettre " tous en cause, ou n'en appeler qu'un seul ; mais qu'il " n'en appelle qu'un ou qu'il les appelle tous, la condam-

“ nation aux dommages-intérêts, s'il y a éviction, n'a tous-
 “ jours lieu que divisément, en proportion de la part héréditaire de chacun d'eux, de manière que celui qui a payé
 “ la sienne est libéré.” Et il ajoute : “ Telle est l'explication
 “ que Cujas donne du traité de la loi Romaine sur ce point ;
 “ et Pothier dans son contrat de vente No. 111, dit pareil-
 “ lement que l'appel en garantie, par l'acheteur troublé, ou
 “ l'action en garantie après l'éviction subie, est bien à la
 “ vérité indivisible quant à la demande, mais non quant
 “ à la condamnation, c'est-à-dire que l'acheteur peut assigner un seul des héritiers du vendeur, ou tous à son
 “ choix, parce que l'obligation de faire jouir est un fait,
 “ par conséquent une obligation indivisible, mais que les
 “ effets de cette obligation sont divisibles entre les héritiers du vendeur, et dès lors que chacun d'eux ne doit
 “ être condamné à payer les dommages intérêts que pour sa
 “ part.

“ Toutefois, ajoute Pothier, si celui qui est attaqué seul,
 “ n'appelle pas ses co-héritiers, il supporte seul les dépens
 “ de l'instance, s'il succombe.

Je ne vois pas qu'il pourrait en être autrement dans le cas de co-héritiers qui ont vendu leurs parts héréditaires dans un immeuble, avec la convention que chacun devait recevoir une sixième du prix stipulé, sans s'obliger formellement à une garantie solidaire entre eux.

La question paraît d'ailleurs avoir été résolue dans le même sens par un jugement de cette Cour rapporté à la page 245, du premier volume du *Jurist*, dans une cause de *Marteau vs. Tetreau*.

Le jugement devra donc être rendu hypothécairement pour toute la somme due, l'hypothèque étant indivisible quant à l'immeuble possédé par le défendeur principal ; mais sur la demande en garantie de ce dernier contre trois des co-vendeurs, le jugement ne sera que pour la moitié, ou chacun un sixième.

Quant aux frais de l'action en garantie, les défendeurs ayant offert de laisser prononcer une condamnation contre eux pour la moitié de la somme demandée, et le demandeur en garantie ayant persisté dans ses prétentions d'indivisibilité de son recours en garantie, ils ne doivent être condamnés aux frais de cette action que jusqu'au jour de la production de leur plaidoyer.

Pour le surplus des frais de la demanderesse, ils devront les payer en entier, et non pour moitié seulement, suivant ce que dit Pothier au No. 110. Contrat de vente.

“ Lorsque l'acheteur n'a appelé en garantie que l'un des héritiers du vendeur, celui qui a été appelé a lui-même intérêt d'appeler en cause ses co-héritiers pour qu'ils soient tenus de défendre conjointement avec lui ; afin qu'ils partagent avec lui les frais de la défense de la cause ; autrement il défendait seul sans les appeler, il supporterait seul les dépens.”

Les trois défendeurs poursuivis auraient dû mettre en cause leurs trois autres co-vendeurs et co-héritiers, pour obtenir la division des frais de l'action.

Jugement. “ déclare le lopin de terre affecté et hypothéqué au paiement de £132 4 6, et condamne le débiteur hypothécairement à payer aux demanderesses et aux dépens de cette action dans les proportions suivantes ; si mieux n'aime etc..... et considérant que les défendeurs en garantie ne sont pas obligés solidairement à la garantie par l'acte de vente du 19 mars, 1860, au dit défendeur principal, par eux et leurs co-vendeurs y nommés, et qu'il y est suffisamment exprimé et apparent qu'ils vendaient leurs parts héréditaires, condamne les dits défendeurs, Léandre Bonneau, Norbert Bonneau, et dame Suzanne Bonneau, trois des dits vendeurs au susdit acte, à garantir et indemniser le dit débiteur principal sur sa demande jusqu'à concurrence de la somme de £66 2 3 et aux frais de la demande principale, et de ceux de la demande en garantie

“ jusqu’au jour de l’introduction de leur plaidoyer, et aux
 “ frais de leur contestation depuis l’introduction du dit
 “ plaidoyer.”

LANCROT, for principal plaintiff and for defendant *en ga-
 rantie*.

M. MARCHAND, for principal defendant and for plaintiffs
en garantie.

QUEE'NSBENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before : Sir L. H. LaFontaine, Bt., Chief-Justice, AYLWIN,
 DUVAL, MEREDITH and MONDELET, Justices.

ADAMS..... *Appellant*.
 and

THE SCHOOL COMMISSIONERS FOR THE MUNI-
 CIPALITY OF BARNSTON..... *Respondents*.

To an action brought to recover £62 10, as “ the balance due for building a model “ school house ” under an obligation from school commissioners in favor of the plaintiff and another, his *cédant*; the defendants pleaded in effect that they levied £150 by rate or assessment and received £150 from the Common School fund, making in all £300, which had been paid over to the plaintiff, and that the commissioners were precluded from levying and expending any further sum, and that the obligation sued upon was inoperative and null.

The clause of the statute (9 Vict. cap. 27, sect. 21, sub-sec. 3.) which defines the duties and powers of school commissioners as to building and repairing school houses etc, contains this provision : “ Provided that “ no rate shall be levied for the building “ of a Superior or Model School to exceed “ the sum of £150.”

Held :—That the obligation was in excess of the £150, for which sum only the municipality could be assessed and condemned to pay, and was inoperative to bind the defendants.

Dans une action portée pour recouvrer £62 10, “ balance due pour la construction d’une maison d’école modèle ” en vertu d’une obligation des commissaires d’école en faveur du demandeur et un autre, son *cédant*; les défendeurs plaidèrent qu’ils avaient prélevés £150 au moyen d’une cotisation et qu’ils avaient reçus £150 du fond des écoles, faisant en tout £300, qui avaient été payés au demandeur, et que les commissaires ne pouvaient soit prélever ou dépenser une plus forte somme, et que l’obligation était nulle et de nul effet.

La clause du statut (9 Vic. ch. 27, sec. 21, sous-sec. 3.) qui définit les devoirs et les pouvoirs des commissaires d’écoles et autant qu’il s’agit de la construction et réparation de maisons d’écoles etc, contient ce *provisé*. “ Pourvu toujours qu’il ne sera prélevé aucune taxe pour la construction d’une Ecole Modèle ou Supérieure excédant £150.”

Jugé :—Que l’obligation excédait la somme de £150, pour laquelle seule la municipalité pouvait être cotisée et condamnée à payer, et était de nul effet quant aux défendeurs.

Judgment rendered the 1st. December, 1860.

The action in the Court below was brought in the Supe-

rior Court, at Sherbrooke, under an obligation of the 5th. July, 1852, by the commissioners in favor of the appellant, and one Hunphrey, who ceded his rights to the appellant, "for £62 10, the balance due for the building of the model "school house at Barnston corner." The defendants pleaded the general issue, also a plea setting up in effect that the then commissioners had raised by assessment £150 for building the school house, and had received a like sum from the common school fund, making in all £300, which had been expended upon the school house; that the commissioners were by law precluded from levying or expending any further sum for that purpose, and that the obligation for the £62 10 was, therefore, null and inoperative to bind the defendants.

The 9 Vict. cap. 27, sect. 21, details the duties of the school commissioners as to building and repairing school houses, and contains this provision: "Provided that no rate "shall be levied for the building of a Superior or Model "School to exceed the sum of one hundred and fifty "pounds."

On the 19 Septembre, 1859, the Court, (SHORT, Justice,) rendered judgment: "Considering that the obligation "was for the payment of a model school house, and "was in excess of £150 for which sum only the munici- "pality could legally be assessed and condemned to pay, "and that the same was and is inoperative to bind the "defendants, the Court doth maintain the said exception "etc."

MONDELET, J.—Held that the expenditure over the sum limited by the statute was illegal, the admission of the debt was also illegal, and that the judgment must be sustained.

AYLWIN, Justice.—Said that there was a fatal defect in the form of the action. It purported to proceed upon a bond signed by four parties with four seals. Such an in-

trument could not bind the Corporation: It goes on to hypothecate the school house lot, this could not be, it was an alienation which these parties could not make. The statute as construed by the appellant was of no avail. The commissioners would have a discretion to build an Ivory palace and make the public pay for it. He approved the judgment of the Court below.

MEREDITH, Justice.—Referred to a passage in the appellants factum which is as follows: "The principle recognized by this judgment is, that the obligations of municipal Corporations, under contract, in matters under their control, are measured by their powers." This is a bold proposition.

In his opinion this principle was not only that recognized by the judgment appealed from, but the basis upon which it rests was incontrovertible. A corporation can no more enter into a contract beyond its powers than if it had no existence, indeed with respect to such contracts, the corporation may be said to have no existence.

The real question in this case was as to whether the respondents had power to make the contract. The general rule is that: "a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted." (1)

The powers of the school commissioners are defined by statute, and there is an express provision, that "no rate shall be levied for the building of a Superior or Model School to exceed the sum of to £150." The object of the Legislature was to prevent school commissioners from subjecting a municipality to a liability for a greater sum than £150, and as, according to law, they could not do so directly by the levying of a rate, neither ought they to be permitted to do so indirectly by the contracting of a debt. If the pretensions of the appellant were well founded, the

(1) Angel and Ames on Corp., pp. 66, 192, 200.

manifest intention of the Legislature, could easily be defeated. The commissioners could contract any debt they liked for the building of a school, the creditors would recover, judgment could be enforced in the ordinary course of law, or by an assessment to be levied under 10th sect. of the 19 Vict. cap. 13.

It has been urged that the commissioners may have extraordinary funds to meet an excess of expenditure, but there is no proof of this being the case. So it was urged, that according to the principle maintained by the Court below, a teacher could not enforce his contract for wages, nor a man who contracted to furnish wood, unless special powers were contained in the law, for levying for such purpose, and then only for the amount specified in the law.

The power to engage school masters and school mistresses is one of the powers expressly given to the commissioners by the statute, and the power to purchase firewood is a power necessary for the purpose of carrying into effect the power expressly granted. The law does not put any limit upon the exercise of these powers ; and therefore a contract entered into in good faith by the commissioners for either of the purposes just mentioned would be valid, and could be enforced by action, but the law has virtually put a limit on the amount to be levied from the public for the purpose of building school houses ; and a contract the direct tendency of which appears to be to defeat the avowed intention of the Legislature, ought not to be enforced in a Court of law.

Judgment confirmed.

SANBORN and BROOKS, for appellant.

RITCHIE and BORLASE, for respondents.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—SIR LOUIS H. LaFontaine, Bart. Chief-Justice,
 AYLWIN, DUVAL MEREDITH and MONDELET, Justices.

CHAMBERLIN..... Appellant.

and

BALL..... Respondent.

In an action against the payee and indorser of a promissory note indorsed in blank, the defendant pleaded : 1o. The insufficiency of the presentment and protest. 2o. That when the plaintiff took the note, it was under an agreement to release the defendant from all liability, and that the defendant put his name on the note simply to convey it to the plaintiff.

Held :—1o. That although the protest was upon its face irregular the defendant could derive no advantage from the irregularity, having failed to file the affidavit required by the 20th. Viot., cap. 44, sect. 87.

2o. That parol evidence could not legally be adduced to prove the agreement that the defendant should incur no liability by reason of his indorsing the note, inasmuch as such evidence tends to vary and defeat a contemporaneous written contract.

3o. That the judgment of the Court below, being founded upon the irregularity of the protest, and on such parol evidence, must be reversed.

Dans une action contre le faiseur et l'endosseur d'un billet promissaire, endossé en blanc, le défendeur plaida : 1o. L'insuffisance de la présentation et du protêt. 2o. Que lorsque le défendeur prit le billet, il fut convenu que le défendeur serait libéré de toute responsabilité, et que le défendeur n'endossait le billet seulement pour le transporter au demandeur.

Jugé :—1o. Que quoique le protêt à sa face fut irrégulier, le défendeur ne pouvait tirer aucun avantage de cette irrégularité, ayant omis de produire l'affidavit requis par la 20ième Viot., chap. 44, sec. 87.

2o. Que témoignage oral ne pouvait être produit pour prouver la convention que le défendeur n'encourrait aucune responsabilité en raison de son endossement du billet, en autant que tel témoignage aurait l'effet de détruire un contrat par écrit.

3o. Que le jugement de la Cour inférieure, étant fondé sur l'irrégularité du protêt, et sur tel témoignage oral, devait être infirmé.

Judgment rendered the 1st. December, 1860.

This appeal was from a judgment of the Superior Court, at Sherbrooke, dismissing the action of the appellant.

The action was brought against the respondent, Ball, as indorser of a promissory note, for \$214.17 and interest, dated Sherbrooke, May 17th. 1858, made by John Turner, and payable ten days after date to the respondent. The note was indorsed by the respondent, by indorsement in blank.

The respondent pleaded *à défense au fonds en fait*, and two peremptory exceptions, which were in substance as follows :—

1. That the promissory note was not presented to the maker, and no demand of payment made of him when it became due, and was not legally protested for non-payment. The certificate of the notary was that he "did exhibit the original promissory note whereof a true copy is above written to a grown person at the hotel in Sherbrooke, called the "Sherbrooke House," kept by the said Wright Chamberlin, (the plaintiff) being the usual place of abode and business of the said John Turner, the promisor thereof, when in Sherbrooke."

2. "That when the promissory note sued upon in this cause was made over to the plaintiff by defendant, it was sold to said plaintiff at a large discount, and plaintiff purchased it upon the sole credit and responsibility of the maker thereof, John Turner, and that the plaintiff accepted the same as such, and agreed to release the defendant from all liability thereof as endorser; and the defendant simply put his name upon the said note to convey the same to him, and order the said John Turner to pay the same to plaintiff; and it was distinctly agreed by and between the plaintiff and defendant, that defendant should incur no liability upon said note to plaintiff by reason of his indorsing his name upon the same, and the plaintiff accepted the same and gave as consideration therefor, only the value of one hundred and sixty dollars in consideration of taking the sole risk of the collection thereof from John Turner, the maker thereof."

The defendant adduced parol evidence in support of his second exception, which was taken *de bene esse* under reserve of objections.

Judgment 18th. June, 1859, SHORT, Justice.—"The Court having heard the parties by their respective counsel, as well on the plaintiff's motion to reject the de-

“ defendant's evidence as upon the merits, and examined the
 “ pleadings and proceedings of record, and upon the
 “ whole deliberated : Considering the evidence adduced
 “ herein by the defendant is legal, and he hath maintained
 “ the allegations of the exceptions by him pleaded, that
 “ the promissory note sued upon was transferred by the
 “ defendant to the plaintiff on the express agreement of
 “ the plaintiff's looking for payment solely to John Turner,
 “ the maker, and no legal presentment for payment of said
 “ note was made at the maturity thereof, and no notice of
 “ non-payment was given to the defendant, and the en-
 “ dorser thereon is fully discharged from all liability
 “ therein, doth overrule the plaintiff's motion to reject the
 “ evidence adduced by the defendant, and doth dismiss
 “ the action of the plaintiff.”

At the hearing in appeal Ritchie, for the appellant, submitted :

That even if there was any irregularity in the presentment, protest and notice, it was waived by the respondent, who neglected to avail himself of the only legal method of objecting to the sufficiency of such protest and notice.

That in the absence of an allegation of fraud, parol evidence was inadmissible in support of a contemporaneous verbal agreement to contradict a valid written instrument.

SANBORN, for respondent contended :

10. That the protest was not made in accordance with the 13th. sect. of the statute 12th. Vict. cap. 22, which required presentment to the maker personally, or at his place of residence or business.

20. That parol evidence in support of the second exception was not evidence against the terms of a written contract. An indorsement in blank had two meanings, both consistent with the terms of the writing. One meaning was, that the indorsement conveyed to the indorsee the

rights of the indorser as payee against the maker; the other included this first meaning and the further obligation to pay, if, on due presentment and protest, the maker did not pay. That parol evidence was admissible to shew as between the parties whether one or both contracts were included in the blank indorsement, by shewing the circumstances which induced indorsement, and the object the parties were desirous of attaining. (1)

MEREDITH, Justice, stated in substance.

That the protest upon its face was defective, but no affidavit as required by the late statute had been filed. The defendant contended that the effect of the statute was merely to cause a protest to be presumed to be what it purports to be on its face. (2) This interpretation would deprive the statute of any effect, because before the passing of the statute a protest was presumed to be what it purported to be on its face. Moreover, according to this interpretation, if a protest filed appeared to be informal, the Court would, even without an affidavit, be bound to presume it to be insufficient and irregularly made, although the law expressly declares, that unless an affidavit be filed the Court shall presume it "to be regularly made." Whatever might be said as to the reasonableness of requiring Courts to presume without proof, yet he thought the statute bound the Court if there was no affidavit to look upon the protest "as regularly made."

As to the parol evidence to support the second exception, he was opinion, that (if admissible) it was sufficient to

(1) *Hill vs. Ellis, Serg. and Rawle*, p. 363 :—*Field vs. Nicholson*, 13 Mass. Rep., 138 :—*Anthon N. P. C.* 4 :—9 Mass. Rep., p. 55 :—1 Cox, 86 :—2 Starkie on Ev., (Am. Ed.) pp. 757, 792. notes :—8 Wendell Rep., 541 :—1 Mason C. C. R. :—9 Ib. p. 754, note :—2 Cond. Louis. Rep., p. 614 :—Ib. 1 vol. 179 :—4 Philips on Ev., Am. Ed., notes p. 600 :—Byles on Bills, Eng. Ed. p. 86.

— "An indorsee of a bill or note, taking it under an agreement not to sue the indorser, cannot sue such indorser though the endorsement be unqualified." Pike vs. Street, Harrison's Dig. p. 520, vbo. "Bills of Exchange."

(2) 20 Vict. cap. 44, sect. 67. If any defendant shall deny his signature, or that the protest, notice or service were regularly made, such instrument, "shall nevertheless be presumed to be genuine, and such protest, notice and service to have been regularly made, unless with such plea there be filed an affidavit &c."

maintain that exception. No rule of evidence was of greater importance or better established than the rule "that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument." (1)

There was only one english case to be found amongst the authorities cited by the respondent's counsel, that was the case of *Pike vs Street*, 1 *Moody and Malkin* p. 226.

The report is as follows :

" This was an action by an indorsee against the drawer
" and indorser of a Bill of exchange.

" The defence was, that although the plaintiff had given
" full value to the defendant for the bill yet that it was
" under an agreement that he should sue Miles, the acceptor
" of the bill only, and that he should not sue the defendant
" as indorser. The agent of the defendant who nego-
" tiated the bill with the plaintiff, said that the plaintiff
" took it under a verbal agreement to that effect.

" It was contended for the plaintiff, *that such an agree-*
" *ment was invalid* and contrary to the nature of a transfer
" by indorsement, which was general and unqualified.

" Lord Tenterden in summing up left it to the jury to
" say whether or not the plaintiff took the bill on the terms
" and conditions that he should have recourse to Miles, and
" to him only, and not sue Street at all, if so, they should
" find for the defendant, *such an agreement being a good*
" *bar to the action*, if they did not believe that, then their
" verdict should be for the plaintiff."

Here the objection was manifestly to the validity of the agreement when proved, and not to the admissibility of the evidence, and the point ruled by Lord Tenterden was merely that the agreement, if proved, was " a good bar to the action."

(1) 1 *Harrison's Digest*, vbo. *Bills of Exchange*, *Evidence to vary Terms*, p. 1348, ed. of 1844 :— 1 *Rose's Leading cases*, p. 166 :—*Addison on Contracts* p. 158 :—*Greenleaf on Ev.*, sect. 281 :—*Holcombe's Leading cases*, p. 356.

Reference was then made by the judge to authors who alluded to this case of Pike and Street, Chitty on Bills p. 144, ed. 1840 :—Byles on Bills, p. 94 ed. of 1859. In the United States it has been frequently held that the effect of a blank indorsement may be restricted by parol evidence. The counsel for the respondent referred to 4 Phillips, p. 600, Cowen's notes, but it is to be observed that the ground upon which the american decisions rest, is stated to be "that in these cases the written engagement was left incomplete by the parties." This ground could not be urged here, as it is provided by the second section of the 12th. Vict. cap. 22, that "a holder under a blank indorsement shall have the same remedy by action, as if the indorsement were in full."

The passage alluded to from the notes of Cowen refers to three american cases as being against the admissibility of such evidence, to which might be added the case Crockers vs. Getchok. (1) Entertaining then the view already mentioned of the english case of Pike vs. Street, and considering that the american cases (even if in other respects unexceptionable) were not applicable to the present case, under our provincial statutes, he was of opinion that the judgment of the Court was erroneous, that the parol evidence should have been excluded, and that the respondent could derive no advantage from the irregularity of the protest.

AYLWIN, Justice, referred to the clause in the provincial statute, and held that it was the duty of the Court to carry out the clause literally as it stood, without reference to technical difficulties.

As to the case of Pike and Street it was manifest that the only thing decided there was that if a party sued on a bill, which he took under an express agreement, such as set up, that was a good defence if proved.

[1] 10 Shep, 392; (5 U. S. Digest, p. 660, no. 1359) :—Commercial Bank of Lake Erie vs. Norton, 1 Hill Rep, p. 501 :—1 Digest, N. Y. Rep. 319 :—1 Halsted, p. 240, no. 130.

If the defendant produced a written agreement to that effect, it was as if *sans recours* were written on the bill. The contract by which an indorser limited or excluded liability against himself by the party to whom he transferred a bill was perfectly legal, if legally proved; nor could any man be permitted to say to a defendant: "True, I took the bill from you on an express promise not to sue you upon it, but I will make you pay it, because your indorsement was in blank." He held the rule which prohibited the adduction of parol evidence to contradict or vary a contemporaneous written contract, to be a sound and well established doctrine, and that the attempts made in such american cases to establish another rule, on the ground of latent ambiguity was most dangerous, and if carried out would be destructive. The evidence in the Court below did not seem to him sufficient to make out the allegations of the exception, but however this might be, he held the evidence was illegal, and the judgment being based upon such evidence, must be reversed:

The Court,... "Considering the appellant hath proved the material allegations contained in his declaration in this cause filed, and considering that although the protest in this cause filed as the exhibit of the appellant No. 2, is irregular, and although the respondent hath sought to avail himself of the said irregularity of the said protest, by the pleading to the merits, by the respondent in this cause firstly pleaded, yet that the said respondent cannot derive any advantage from the said irregularity, inasmuch as he has failed to file with his said pleading an affidavit as required by the 87th. section of the statute 20th. Victoria, cap. 44; and considering that the said respondent could not legally adduce parol evidence to prove that at the time he endorsed the promissory note mentioned in the declaration of the appellant, it was verbally agreed, as alleged by the said respondent, that the said respondent should incur no liability upon the said note, by reason of his endorsing the same, inasmuch

“ as the tendency of such parol evidence is to vary and
 “ defeat a contemporaneous written contract, and therefore,
 “ that in the judgment of the Court below, which is
 “ founded as well upon the said irregularity of the said
 “ protest, as upon the said parol evidence, there is error,
 “ the Court doth in consequence reverse the said judg-
 “ ment, &c.

RITCHIE and BORLASE, for appellant.

SANBORN and BROOKS, for respondent.

**BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.**

Présents :—Sir L. H. LAFontaine, Bart. Juge-en-Chef,
 AYLWIN, DUVAL, MEREDITH et C. MONDELET, Juges.

LA COMPAGNIE DU GRAND TRONC DE CHEMIN

DE FER DU CANADA..... Appelante.

et

LA CORPORATION DU COMTÉ DE LÉVIS, Dis-

TRICT DE QUÉBEC..... Intimée.

Jugé :—Que la confection et le main-
 tien d'une rue n'est pas un " ouvrage de
 comté " d'après les termes de la 2^{me}
 sous-section de l'acte des Municipalités
 et Chemins de 1855, (1) mais est un " ou-
 vrage local " aux termes de la 3^{me} sous-
 section de la même section, pour lequel
 un conseil de comté ne peut prélever une
 taxe.

Held :—That the making and main-
 taining of a street is not a " county work "
 within the meaning of the 2d. sub-section
 of the 39th, section of the Lower Canada
 Municipal and Road Act of 1855, but
 is a " local work " within the meaning of
 the third sub-section of the same section,
 for which the county council cannot levy
 a rate.

Jugement rendu le 17^{me} jour de décembre, 1860.

L'intimée, demanderesse en Cour inférieure, poursui-
 vait l'appelante devant la Cour de Circuit siégeant à
 Québec, pour la somme de £25, courant, montant, était-il
 allégué, reparti sur l'appelante en vertu d'une certaine ré-
 partition faite sous forme de règlement par la Corporation
 du comté de Lévis, pour pourvoir à l'ouverture, confection
 et entretien d'une certaine rue, appelée la rue Wolf, dans
 la Paroisse de Notre-Dame de la Victoire, comté susdit :

(1) 18 Vic., cap. 180.

l'ouverture, confection et entretien de laquelle rue étaient faits sous l'autorité d'un certain procès-verbal du conseil du comté de Dorchester, No. 2, en date du 13 mars, 1854. L'appelante était ainsi poursuivie comme propriétaire en possession de certains immeubles sujets à imposition en vertu du dit procès-verbal et de la dite répartition.

A cette action, l'appelante répondit par une défense au fonds et en fait, et par une exception péremptoire en droit perpétuelle.

Par cette exception, il était en substance allégué :—Que le procès-verbal était nul ; que le chemin, dont il était question, était un chemin de front, et que partant il devait être fait par les propriétaires voisins d'icelui, et non par les propriétaires éloignés ; que l'évaluation sur laquelle la répartition était basée n'était pas applicable au cas, et qu'elle était nulle ainsi que la dite répartition ; *que l'action ne pouvait être portée par la corporation du comté de Lévis ; mais devait être portée par la corporation de la paroisse de Notre-Dame de la Victoire.*

La demanderesse, intimée, examina des témoins pour prouver certains documents par elle produits au soutien de son action, la localité de la rue Wolf, ainsi que la localité des propriétés de l'appelante.

Il ne fut examiné aucun témoin de la part de la défenderesse.

Le 22 mai, 1860, par le jugement de la Cour de Circuit, l'appelante fut condamnée à payer à la demanderesse la somme de £25, courant, " pour sa part de contribution pour l'ouverture, confection et entretien de la rue Wolf, dans le comté de Lévis, " avec intérêt et dépens.

MEREDITH, Justice.—By the judgment complained of, the appellants were condemned to pay £25, as their share of the contribution for opening, making and keeping up a street, called Wolf street, in the parish of Notre Dame de la Victoire. The street in question was established, and

required to be kept open, by a by-law of the municipal council of the late county of Dorchester, No. 2, which is now included in the present county of Lévis.

The roll *d'évaluation*, which is the basis of the *acte de répartition* under which the appellants are sought to be charged the sum in dispute, bears date the 20th. August, 1855, and was made under the authority of the municipality of the parish of Notre Dame de la Victoire; and the repartition itself bears date the 10th. day of June, 1857, and was made by the municipality of the county of Lévis.

It is contended on the part of the appellants that the corporation of the county of Lévis had no power to make the *répartition* in question, which ought, the appellants say, to have been made by the local municipality of the parish of Notre Dame de la Victoire, within which Wolf street, the street for which the contribution is claimed, is situate.

Wolf street according to the pleadings and proof is situate within the local municipality (1) of the parish of Notre Dame de la Victoire, and, according to the *procès verbal* already mentioned, is to be made and maintained at the expense of persons owning land in a portion of that municipality.

Therefore the making and maintaining of that street is not a county work within the meaning of the 2d clause of section 39 of "The Lower Canada Municipal and Road Act of 1855"; but is a "Local Work" within the meaning of the 3rd clause of the same section.

The 23rd section of the same statute defines and explains the powers common to all local councils—and declares in the first clause of that section that the powers and authority of each "local council" shall extend among other things to the opening, making and maintaining of any new, or existing road, street or other communication within the municipality—and the fifteenth section of the same statute, which declares what are the "powers common to all mu-

(1) See section 7 [p. 391] of 18 Vict. cap. 100, as to meaning of Local Municipality.

municipal councils" provides by the 7th. clause that every council shall have power and authority to make a by-law for raising and levying such sums of money as may be necessary for any purpose within the scope of the functions of such council; such sums to be raised by rates equally assessed upon all the persons liable thereto, in proportion to the value of their assessable property.

It therefore seems that the making and maintaining of the street in question was within the powers of the local municipality of the parish of Notre Dame de la Victoire, and that the council of that municipality could have levied a rate for that purpose; and I do not see that under the statute, the council of the municipality of the county of Lévis could have exercised any such power.

The learned counsel for the respondent says that the *acte de répartition* was *fait, ordonné et révisé par le conseil du comté de Lévis, seule autorité compétente*, and refers in support of that proposition to the 18th. Vict. cap. 100, sec. 37, Nos. 1, 2, 4, 5, and also to section 50. The only part of section 37, which seems to me to have any important bearing upon the present case, is the latter part of subsection 5. "And it shall be lawful for any county council to cause a rate or rates to be levied on the assessable properties in any locality within such county forming a separate municipality, or part of a municipality, or parts of several municipalities, *for the payment of any debt or debts contracted or work or works done for the advantage of any such locality by any county or parish municipality heretofore existing*, or upon the whole county if such debt or debts was or were contracted or such work or works performed for the benefit of the whole county; *and every such rate may be levied for the satisfaction of any equitable claim, whether such debts were contracted or such works performed according to the formalities required by law or not.*"

The exceptional power given by the clause just quoted

is so given in order to provide for the payment of debts contracted or work done by any municipality *theretofore subsisting*. The work in question is not alleged to have been such work, and Léon Roy, the secretary and treasurer at the time, (examined by the respondents) says that Wolf street was made and finished in the year 1856—and if so it clearly is not a work for which the county council could levy a rate under the clause in question.

And it may be observed that the rule in this respect laid down by the legislature does not seem unreasonable. It was necessary to allow the county councils to provide for the debts of the municipalities which the statute put an end to. But there was no reason to allow the county council to levy rates to pay debts to be contracted or work to be done by the local corporations created by the same statute.

The section 50 is as follows :

“ Provided always, that the council of any municipality may raise by assessment any sum of money for making and maintaining the roads and bridges therein, or any of them, and may apply the sum so raised to that purpose in such manner as they shall think proper, notwithstanding any thing to the contrary in any *procès verbal* contained.”

The power thus given to any municipality, must be understood to be confined to the roads and bridges within the control of such municipality; and I think I have already shown that Wolf street, situated as it is within the limits of the local municipality of the parish of Notre-Dame de la Victoire, is under the control of that local municipality, and not under the control of the county municipality.

In addition to what I have already said as to this point, I may refer to the section immediately preceding that relied on by the learned counsel for the respondents, I allude to section 49, under which a *procès-verbal* of the

county superintendant, which concerns the inhabitants, or a portion of the inhabitants, of *one local municipality and no more*, is to be deposited in the office of the council of such local municipality ; and it is only where such *procès-verbal* concerns the inhabitants of *more than one local municipality* (which is not the case in the present instance) that the *procès-verbal* is to be deposited in the office of the county municipality.

The learned counsel for the respondents in the last page of his factum further observes : “ D’ailleurs, tout conseil a droit d’ordonner une répartition,” and in addition to the 50th. section of the 18th. Vict., cap. 100, refers to the 20th. Vict., c. 41, sec. 3, sub-sec. 3, which declares that “ every council shall be empowered by resolution to impose and levy upon the parties interested in any work undertaken for the benefit of the municipality, or for any part of the inhabitants of the municipality, a special tax to provide for the payment of such work, although the performance thereof may not have been preceded or followed by the formalities required by law.”

This clause gives all municipal councils a very extensive power as to taxation ; but the power so given must be understood (as already observed with respect to section 50 of 18th. Vict. cap. 100) as being restricted to works within the control of the council imposing the tax ; and according to my views, as already explained, the street in question was not, and is not, under the control of the municipality of the county of Lévis.

Moreover the action is founded upon an *acte de répartition* made to carry out the *procès-verbal* of the 13th. March, 1854, and does not purport to be brought for the recovery of a special tax imposed under the 20th. Vict., cap. 41 ; which, it may be observed, received the royal sanction, on the same day that the *acte de répartition* bears date.

The conclusion, therefore, at which I am forced to arrive is that the municipal council of the county of Lévis had

not power to make the *acte de répartition* impugned by the appellants, and, therefore, that the action founded on that repartition ought not to have been maintained.

MONDELET, Justice.—A question has been raised as to the informality of the *acte de répartition* itself. The county superintendent's certificate shewed that it had been published in french, nor was it under oath. These objections alone would have been sufficient to warrant the dismissal of the action.

SUZOR, pour l'appelante.

BERNIER, pour l'intimée.

BANC DE LA REINE, }
EN APPEL. } DISTRICT DE QUEBEC.

Présent :— Sir L. H. LaFontaine, Bart., Juge-en-Chef,
AYLWIN, DUVAL MONDELET et MEREDITH, Juges.

LAVOIE..... *Appelant.*

et

REGINA..... *Intimée.*

Jugé :— Que l'hypothèque générale donnée à la Couronne par la 18me section de la 9me Vict., chap. 62, pour avances en vertu de cette acte, est valide sans enregistrement, quoique le prêt ait été fait après que l'emprunteur eut rebâti, et n'est pas été appliqué tel qu'il était compris.

Held :— That the general mortgage given to the Crown by the 18th section of the 9th Vict. cap. 62, for advances under that act, attaches without registration, although the loan was made after the borrower had rebuilt, and was not applied as contemplated.

Jugement rendu le 17me decembre, 1860.

Sir L. H. LaFontaine, Bart., Juge-en-Chef. — Une somme de £300 ayant été avancée par les commissaires sous l'autorité des statuts passés pour venir au secours des incendiés de Québec, en 1845, à Pierre Lavoie, défendeur en cette cause, et père de l'appelant, et les propriétés de l'emprunteur ayant été depuis vendues par le shériff, deux oppositions afin de conserver ont été faites, l'une de la

part de l'appelant qui avait une hypothèque spéciale sur le lot No. 1, et l'autre de la part de la Couronne qui réclamait privilège, puis hypothèque générale, et cela en vertu d'actes antérieurs à la création de l'hypothèque acquise par l'appelant. Celui-ci a contesté l'opposition de la Couronne.

Quant au privilège, il n'existe pas, l'édifice érigé sur le lot en question l'ayant été avant le prêt fait par les commissaires. Il resie l'hypothèque générale que la Couronne fait valoir. L'appelant répond qu'elle ne peut lui porter aucun préjudice, car elle n'a pas été inscrite au bureau des hypothèques. Il aurait raison si le statut particulier qui, relativement aux incendies emprunteurs, donne à la Couronne et privilège et hypothèque générale, ne l'avait pas dispensée de prendre inscription soit pour l'un, soit pour l'autre. Les commissaires pouvaient, il est vrai, prendre plus de précautions pour s'assurer que les deniers avancés seraient réellement employés à la construction à laquelle ils étaient destinés. Mais de ce qu'il n'y a pas eu de leur part ce surcroît de précaution, il ne s'en suit pas que la Couronne doit perdre son hypothèque. Le statut a disposé pour ce cas-là même. Il rend coupable du délit d'avoir "obtenu de l'argent sous de faux prétextes," l'emprunteur qui n'a pas employé les deniers à leur destination. Mais cette disposition elle-même, montre que le législateur a prévu le cas où les deniers pourraient être placés par les commissaires entre les mains de l'emprunteur sans plus de garantie que celle qui résultait de l'hypothèque acquise purement et simplement par la Couronne.

Non seulement la Couronne avait hypothèque sur les immeubles, mais même si l'emprunteur tombait en faillite, elle devait être "d'abord payée et acquittée à même les biens meubles et effets préférablement à la réclamation de tout autre créancier."

Je pense donc qu'il y a eu bien jugé, et que, par conséquent, le jugement de la Cour de première instance devrait être confirmé.

MEREDITH, Justice.—In this case the question to be decided is this :—Could the commissioners, under the 9th. Vict., cap. 62, legally make the loan for which the Crown seeks to be collocated in the present suit ; for if that loan was legally made, it is plain that, irrespective of any question of privilege, the crown has, under the 18th. section of the statute already cited, a general hypothec, free from the formality of registration, and bearing date more than a year before the hypothec of the appellant.

It is however contended that after the fire of the 28th. of May, 1845, and before the loan made by the commissioners, the defendant had, as it is said, “rebuilt his house,” or to speak more accurately, had built a house, upon the lot No. 1, mentioned in the pleadings in this cause ; and therefore that the hypothec, upon which the crown relies, cannot be held to have been given in pursuance of the provisions of the statute already cited.

This pretension cannot I think be maintained.

The defendant, it is admitted, was one of the sufferers by the disastrous fire of the 28th. of May, 1845 ; as such he was entitled to a loan ; and the object for which, according to the deeds, the loan was given to him, was “*pour l'aider à bâtir et parachever sa maison sur son terrain*” &c.

The commissioners could lawfully make a loan for that purpose, inasmuch as, under the 18th. section of the statute, the borrower had a right to expend the sum advanced to him, not only in “erecting buildings,” but in making “other improvements.”

The defendant, it is true, before the loan from the commissioners, had erected a house upon his *emplacement* (lot No. 1) ; but there was nothing to prevent him from expending the sum loaned to him, in improving the house so built, either by additions or otherwise, or in erecting another dwelling house, or out buildings, or in otherwise improving the same property. Were we to hold a contrary

doctrine, and to maintain the pretension of the appellant, we would have to say, that the erection of a building, however small, by a person entitled to a loan, would defeat his right to a loan ; however necessary such loan might be for the improvement either of the building itself or of the property generally ; and such a conclusion would, I think, be opposed both to the letter and to the spirit of the statute. I therefore think that the commissioners could legally make a loan to the defendant, although before the making of that loan, he had erected a house upon the lot in question.

It is also contended by the appellant that as no part of the money advanced by the commissioners was expended upon that lot, they, or rather the Crown, cannot have the benefit of the hypothec granted for the sum of money so advanced.

The 18th. section of the statute contains the following provisions.

“ Provided always, that the priority of privilege above mentioned shall be understood to mean a priority of privilege over all mortgages, *hypothèques*, and over all other privileges whatsoever upon the value of the buildings to be erected, and the increased value of the lot or lots of ground by reason of such buildings having been erected thereon, and other improvements having been made upon the said properties by means of the sums of money to be advanced and lent under this act, together with a general mortgage, *hypothèque générale*, which shall attach on the lot of ground and other immoveable property, of the person or persons to whom such sums of money shall be advanced and lent, and of which such person or persons shall be then possessed, or shall thereafter become possessed, and which said mortgage shall take its rank from the date of the bond or obligation to be entered into, &c.” The same clause then in express terms re-

lieves the Crown from the obligation to register any such privilege or general hypothec.

In the present case the Crown can have no privilege, because "no buildings were erected" or "other improvements made" "by means of the money advanced" under the statute.

But the existence of the general hypothec did not depend upon the proper application of the money advanced; on the contrary it attached to the property the moment the loan was effected, and the deed passed; and therefore before any application of the money could be made by the borrower; and the hypothec so created could not be defeated by the subsequent misconduct of the borrower.

The learned counsel for the appellant drew the attention of the Court to the 20th. section of the statute under which the commissioners, if "they had cause to apprehend" that the applicant would not apply the sum to be advanced to him, to the purposes intended by the statute, might exact one or more sureties to secure that object—And which also provides that it should "be lawful" for the commissioners, whenever "they saw fit," to take certain other precautions for the same purpose.

It is to be observed, however, that the commissioners were given a discretionary power as to the taking of the precautions mentioned in the section of the statute just referred to. Moreover, the provisions of law under consideration were, it is manifest, framed for the purpose of securing a privilege to the crown; and therefore ought not to be so interpreted as to defeat the general hypothec, which exists irrespective of such privilege. For these reasons I have no hesitation in saying that the judgment of the Court below ought to be confirmed.

LEMIEUX and RÉMILLARD, for appellant.

CASEULT and LANGLOIS, for respondent.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2146. { THE SCHOOL COMMISSIONERS OF
ST. PIERRE DE SOREL..... *Plaintiffs.*
VS.
THE SCHOOL COMMISSIONERS OF
WILLIAM HENRY, *et al* *Defendants.*

Held :—1o. That a certain surrender by the Royal Institution for the advancement of learning (1) to the school municipality of the Town of William Henry, in 1851, of a lot of land within the territorial limits of the parish of Sorel, was null and void; and that a new surrender must be made favor of the plaintiffs.

2o. That under the 9th. Vict., cap. 27, the various school municipalities had a right to obtain a surrender from the Royal Institution of the lands held by the institution in trust for school purposes within their respective municipalities; that the municipality of the parish of Sorel and that of the Borough of William Henry formed but one municipality for school purposes, and that a separation or division of school municipalities took place under the 12th. Vict. cap. 50, without any settlement as to the division of the lot by the school commissioners being provided thereby, in the act as to such division.

3o. That the surrender ought to have been made to the school municipality, within whose limits the lot was situate.

Jugé :—1o. Qu'un certain abandon par l'Institution Royale pour l'avancement des sciences à la municipalité scolaire de la ville de William Henry, en 1851, d'un terrain dans les limites territoriales de la paroisse de Sorel, était nul; et qu'un nouvel abandon devait être fait en faveur des demandeurs.

2o. Qu'aux termes de la 9me. Vict. chap. 27, les diverses municipalités scolaires avaient droit d'obtenir un abandon de l'Institution Royale des terrains tenus par cette institution en fidéicommiss pour les objets scolaires dans leurs municipalités respectives; que la municipalité de la paroisse de Sorel et celle du Bourg de William Henry ne formaient qu'une municipalité pour les objets scolaires, et qu'une séparation ou division des municipalités scolaires eut lieu sous la 12me Vict. chap. 50, sans aucune disposition quant à la division du terrain par les commissaires d'écoles.

3o. Que l'abandon eut dû être fait à la municipalité scolaire, dans les limites de laquelle le lot était situé.

Judgment rendered the 31st. December, 1860.

This was an action to have a deed of surrender in favor of the defendants made by The Royal Institution for the *advancement of learning*, on the 14th. August, 1851, of 200 acres of land in the seigniorship of Sorel set aside, as having been made by error, and on the false representations of the defendants, and a new surrender ordered to be made in favor of the plaintiffs, also to eject the defendants from the possession of the lot.

The pleas set up in effect : 1o. A possession by the defendants and *their auteurs* for fifty years of the lot and its revenues for the school of the Town or Borough. 2o. That

(1) *Con. Stats.*, cap. 17, p. 107.

the Royal Institution under the 9th. Vict. cap. 27, was by law bound to surrender the lot to the defendants who were then in possession. That since the division of the parish of St. Pierre de Sorel into two municipalities for school purposes, the lot had been enjoyed by the municipality of the Borough, and that, in any event, the plaintiffs could only demand a part of the lot in proportion to the population of the parish compared with that of the Borough.

SMITH, Justice, in rendering judgment, held : — That a possession of thirty years had not been made out by the defendants ; that the surrender made in 1851 by the Royal Institution, being subsequent to the separation of the parish of Sorel into two school districts, in virtue of the statute of 1841, 12th. Vict. cap. 50, was unauthorized, and should have been made in favor of the school municipality of the parish within which the lands were situate. (1)

JUDGMENT.—“ Considering that the said plaintiffs have
 “ established by legal and sufficient evidence that the lot of
 “ land sought to be recovered in and by the present action is
 “ situated within the territorial limits of the municipality
 “ St. Pierre de Sorel, and that in virtue of the act of the 9th.
 “ Vict. cap. 27, the several municipalities established
 “ for school purposes in Lower Canada are empowered
 “ and authorized to enter upon and take possession of the
 “ lands and school houses situated and lying within the
 “ territorial limits of the several school municipalities,
 “ and are entitled to claim from the Royal Institution a
 “ surrender of all such lands and school houses as were
 “ before then vested in the Royal Institution for the ad-
 “ vancement of Learning, and so lying within the several
 “ municipalities as aforesaid. And further considering

(1) 9 Vict. cap. 27, (1846) sect. 21.

“ It shall be the duty of the school commissioners in each municipality, firstly :
 “ To take possession of lands and school houses which may have been acquired,
 “ given to, or erected by the school trustees or commissioners, and to which the pro-
 “ vince may have contributed in virtue of any former act, or by the Royal Insti-
 “ tution (which institution is hereby authorized to surrender the same,) under any
 “ act for the encouragement or promotion of education, and in case of opposition,
 “ to give notice thereof to the superintendent of schools, who shall advise them as
 “ to the means of removing or overcoming such opposition.”

“ that at the time of the passing of the above recited act,
 “ there was but one municipality created for school pur-
 “ poses within the parish of Sorel, and that at the
 “ time of the passing of the said act, the said plaintiffs
 “ were, by force of the said statute, entitled to claim
 “ from the Royal Institution a surrender of the said lot,
 “ for school purposes as aforesaid ;—and considering that at
 “ the time of the separation of the said school munici-
 “ pality of the parish of Sorel, which separation took place
 “ under and by virtue of the 12th. Vict., cap. 51, the said de-
 “ fendants had no separate existence in law, or any right
 “ to claim any surrender whatsoever of the said lot of land ;
 “ and further considering that at the time of the division of
 “ the said municipality of Sorel, into two municipalities,
 “ as aforesaid, no provision whatever was made by the
 “ said municipalities for any settlement, or distribution, or
 “ division of the said lot ; and further considering that the
 “ said statute 12th. Vict., cap. 51, doth not make any such
 “ division or settlement whatever ; and further considering
 “ that neither the municipality of Sorel, nor the separate
 “ municipality of the Borough of William Henry, ever had
 “ any legal possession of the said lot of land, but that the
 “ said lot until the surrender made by the Royal Institu-
 “ tion to the said defendants, vested in, and was possessed
 “ in law by the Royal Institution for the trusts created by the
 “ act creating the said Royal Institution ; and further consi-
 “ dering that under the said circumstances, the Royal Insti-
 “ tution had no authority by virtue of the said statute 9 Vict.
 “ cap. 27, to make a surrender of the said lot to any munici-
 “ pality other than the one within whose territorial limits
 “ the said lot was situated, and that no possession by the
 “ said municipality of Sorel, or by the defendants, without
 “ title, could divest the Royal Institution of the said lot of
 “ land, or in any wise authorize the surrender thereof ; and
 “ further considering that the said defendants have failed
 “ to establish any title in law, or under the 9th. Vict. cap.
 “ 27, by reason of which the said surrender of the said lot

" can be held to be valid or binding ; the Court..... declares the said surrender null and void—declares the plaintiffs entitled to the lot, and orders the Royal Institution to execute a valid surrender of the lot."

CHERRIER, DORION and DORION, for plaintiffs.

CARTIER and POMINVILLE, for defendants.

SUPERIOR COURT.—MONTREAL.

Before :—**BADGLEY**, Justice.

No. 1301. { **SEYMOUR et al.**, *Plaintiffs.*
vs.
{ **WOODBURY**, *Defendant.*

The plaintiffs hearing that one of their country debtors was fraudulently making away with his property, sent a clerk to the spot to make inquiries, but without special instructions or power. The clerk took the debtor's note for 5s. in the pound, which was refused by the plaintiffs and sent back.

Held :—In an action for the original debt, that the receipt and discharge were not binding on the plaintiffs, the clerk having exceeded his authority.

Les demandeurs ayant appris que l'un de leurs débiteurs à la campagne recélait frauduleusement ses effets, envoyèrent un commis sur les lieux pour s'en enquérir, ne lui donnant aucune instruction spéciale ou aucune autorité. Le commis prit le billet du débiteur pour 5s. dans le louis, lequel les demandeurs refusèrent.

Jugé :—Dans une action pour la dette originaire, que le reçu et la quittance ne liaient pas les demandeurs, le commis ayant excédé son autorité.

Judgment rendered the 30th. October, 1860.

This action was commenced by *capias ad respondendum*. The declaration set up an indebtedness for goods sold and delivered, and that for such goods a promissory note for \$ 938.60, was given to the plaintiffs. The defendant pleaded *novation* by settlement with the plaintiffs' clerk, and produced a receipt dated four days previous to the institution of the action, signed by the clerk, in the following terms :

" Received from C. E. Woodbury, by note at four months, the sum of two hundred and forty dollars in full of all claims and demands to date.

" **SEYMOUR, WHITNEY & Co.**,

" per pro., **J. THAYER, Jr.**"

The plaintiffs replied that they had never authorized such receipt, and that the debt was not novated.

BADGLEY, J.— This cause rests on the point whether the plaintiffs' clerk had authority to bind his employers by taking a note for about 5s. in the pound of the original debt. He is the only witness examined, and I am clearly of opinion he had no such authority. His employers received notice that one of their debtors in the place where the defendant lives was making away with his property, without saying who the debtor was; the witness was sent out to make enquiries only, and without any orders or instructions to arrange or compromise. The clerk sees the defendant who tells him that unless 5s. in the pound were taken by note, his employers would get nothing, and upon this a note was taken and the receipt in question given. But the employers repudiated the whole matter, sent back the note, and sued for their original debt, for which they must have judgment.

ABBOTT and DORMAN, for plaintiff.

DOHERTY, for defendant.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—SIR L. H. LaFontaine, Bart. Chief-Justice,
 AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BURROUGHS, *Appellant.*

and

SIMPSON, *Respondent.*

Held :—That a bond upon an appeal entered into before the issuing of the writ of appeal, is null and void.	Jugé :—Qu'un cautionnement en appel consenti avant l'émission du writ d'appel, est nul et de nul effet.
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Judgment rendered the 7th. December, 1860.

In this cause a motion was made on a variety of grounds to dismiss the appeal.

The Judgment of the Court was as follows :

" Seeing that the bond or security given in this cause
" was received before the prothonotary of the Superior
" Court at Ste. Scholastique, before the issuing of the writ
" of appeal in this cause, and is therefore null....." Writ
quashed with costs.

BURROUGHS, for appellant.

ABBOTT and DORMAN, for respondent.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE. }

Before : — Sir L. H. LaFontaine, Bart., Chief-Justice,

AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

LIONNAIS,..... *Appellant.*

and

GUYON DIT LEMOINE,..... *Respondent.*

Held :—That an inscription for proof
and for hearing on the merits of an ex-
ception of prescription, and sale of liti-
gious rights, is irregular, it being a par-
tial inscription, made without leave of
the Court.

Jugé :—Qu'une inscription pour preuve
et audition aux mérites sur une exception
de prescription, et de vente de droits li-
tigieux, est irrégulière, icelle étant une
inscription partielle, faite sans la per-
mission de la Cour.

Judgment rendered the 7th. december, 1860.

In this cause, which was brought in the Superior Court,
Montreal, an exception of prescription, and sale of litigious
rights, was filed, with other pleas, by the defendant who
inscribed the cause for proof and hearing on the merits of
the exception only, the same day the plaintiff inscribed for
proof and hearing on the merits of the cause generally.
The Superior Court, BADGLEY, Justice, by judgment of
the 30th. November, 1860, dismissed the defendant's mo-
tion to reject the plaintiff's inscription, and granted the mo-
tion of the plaintiff to reject the inscription made by the de-
fendant. On a motion for a writ of appeal from this
judgment the Court of appeals rendered the following
judgment :

"The Court &c.,.... Considering that the inscription on the roll *d'enquête* by the said Hardoin Lionnais for the adduction of evidence, and for final hearing on the merits of the exception alleging prescription and a sale of litigious rights, without including in such inscription the other issues raised in the cause, was irregular, inasmuch as such partial inscription was made without leave of the Court, and that the said Hardoin Lionnais hath offered no valid reason in support of his said motion for leave to appeal to this Court; doth order that the said Hardoin Lionnais take nothing by his motion."

LEBLANC and CASSIDY, for appellant.

FLEMING, for respondent.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 714.	{	ROBERT..... Plaintiff.
		DANIS, <i>et al</i> Defendants.

VS.

In an action brought by the proprietor of a lot in the city of Montreal, against adjoining proprietors, to oblige them to close up an opening alleged to be in their gable wall having a *vue droite* upon the plaintiff's premises, it appeared that the lower story of the defendants' house was at about nine feet from an old division fence between the respective properties, but that the second story recently built came up to the division fence, with a passage underneath from the street. No opening was found in the second story looking into the plaintiff's lot, but beneath, and between it and the top of the fence, was an opening which looked directly upon it.

Held :—1o. That the opening was contrary to the 202d. article of the Custom of Paris.

2o. That the judge, in a case of this description, will make a *descente sur les lieux* when requested by the parties.

Dans une action portée par le propriétaire d'un terrain dans la cité de Montréal, contre des propriétaires voisins, pour les obliger à fermer une ouverture qu'il disait exister dans leur pignon, et qui avait vue droite sur la propriété du demandeur, il fut constaté que l'étage inférieur de la maison des défendeurs était à environ neuf pieds d'une ancienne clôture de division entre les propriétés des parties, mais que le second étage récemment érigé venait jusqu'à la clôture de division, avec un passage en dessous. Il n'y avait aucune ouverture dans le second étage ayant vue sur le terrain du demandeur, mais au dessous, et entre cet étage et le haut de la clôture, il y avait une ouverture qui avait vue sur le terrain.

Jugé : — 1o. Que l'ouverture était en contravention à l'article 202 de la Coutume de Paris.

2o. Que le juge, en pareil cas, fera une descente sur les lieux si il en est requis par les parties.

Judgment rendered the 31st. december, 1860.

This was an action brought by a proprietor of a house and lot in St. Joseph Street, Montreal, against his neigh-

bours, the defendants, to cause them to close up an opening alleged to exist in the north east gable of their house, on the line of division between the respective properties of the parties, by which a direct view was had upon the plaintiff's premises.

The plea set up that there was no such opening in the gable of the defendants' house; that there was a division fence ten feet high between the properties, along their whole depth; that the lower story of the defendants' house was built at nine feet from the fence, that the gable of the second story came up to the division line, leaving a passage under the second story from the street, and that this second story had no opening in it towards the plaintiff's premises; general answers were filed and the parties went to proof.

BERTHELOT, Justice.—Stated pleadings, and said that at the request of the parties he had twice visited the place. Below the second story of the defendants' building there was a space or opening left between it and the top of the old fence, in the line separating the respective properties. This opening probably left to give light to the passage had been closed up with boards by the plaintiff, which had been removed by the defendants. He held the action well founded, and judgment must be given for the plaintiff, but only for nominal damages under the circumstances.

Jugement :—" Considérant qu'il y a preuve suffisante
 " que les défendeurs ont converti et exhaussé la clôture vi-
 " cinale entre leur héritage et celui du demandeur, de ma-
 " nière à en former le pignon nord-est de leur maison sur
 " leur dit héritage, dans lequel pignon il paraît qu'ils ont
 " laissé une ouverture au-dessous du second étage de cette
 " partie de leur dite maison qui conduit de la rue à leur
 " cour, au moyen de laquelle ouverture ils ont une vue
 " droite sur l'héritage du demandeur, ce qui est contraire
 " à la loi et à l'article 202 de la Coutume de Paris ; con-

“ damne les défendeurs à fermer etc., et en outre à cin-
 “ quante chelins de dommages.”

LAFLAMME, R. and G. for plaintiff.

LEBLANC and CASSIDY, for defendants.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1901. { PANGMAN..... Plaintiff.
 vs.
 { BRICAULT DIT LAMARCHE, et al.,... Defendants.

An action was brought by a signior, setting up his title and right of *banalité*, the concession to one of the defendants of a lot of land in his seignior, with a clause in the deed that no mill of any kind should be erected; that the defendants, copartners, had built a saw mill on a non-navigable river bordering on the conceded lot, and had erected a dam across the river, by means whereof the waters were thrown back upon the saw mill and grist mill of the plaintiff which had been in use for more than thirty years, thereby impeding the working of the mills and causing great damage.

Conclusion. That it be declared that the defendants had no right to erect the saw mill or any mill, for the demolition of the dam and in damages.

Held.—That by the statute 20th. Vict. cap. 104, the plaintiff was precluded from his conclusions *en démolition*, that he had no right to the exclusive use of the water; and that the defendants were liable for all damage caused by the too great height of the dam, or otherwise—*Expertise* ordered to determine whether the dam and other works caused any damage to the plaintiff, and to value and fix the amount of such damage, if any.

Dans une action portée par un seigneur, alléguant son titre et son droit de *banalité*, concession à l'un des défendeurs d'une terre dans sa seigneurie, avec clause dans le contrat qu'aucun moulin ne serait érigé; que les défendeurs, associés, avaient construit un moulin à scie sur une rivière non navigable avoisinant le terrain concédé, et avait érigé une chaussée sur la rivière, qui faisait refluer les eaux sur le moulin à scie et le moulin à farine du demandeur qui avaient été en opération pendant plus de trente ans, et qui empêchait le fonctionnement des moulins et causait de grands dommages.

Conclusion. Qu'il fut déclaré que les défendeurs n'avaient aucuns droits d'ériger un moulin à scie ou aucun autre moulin, que la chaussée fut démolie et les défendeurs condamnés en dommages.

Jugé :—Que par le statut de la 20^e Vic. ch. 104, le demandeur n'avait pas droit à des conclusions *en démolition*, qu'il n'avait aucun droit à l'usage exclusif des eaux; et que les défendeurs étaient responsables des dommages causés par la hauteur de leur chaussée, ou autrement—*Expertise* ordonnée afin de constater si la chaussée et autres ouvrages des défendeurs causaient des dommages au demandeur, et pour en estimer le montant, si aucun il y avait.

Judgment rendered the 31st. october, 1860.

The plaintiff in his declaration alleged, in effect : That he was proprietor and in possession of the seignior of Lachenaie, with the right of *banalité* by law, and by his titles of concession, and had possession for more than thirty

years of a *moulin banal*, on the river *L'Achigan*, a river non-navigable, also a saw mill adjacent.

That the defendants were both *consitaires* of the plaintiff, and that in the deed of concession to one of the defendants, *Pichette*, of a lot of land on the said river, there was a clause that no grist or other mill should be erected, that the defendants formed a copartnership by notarial act of the 2d January, 1857, to carry on a saw mill erected by them on *Pichette's* land, at about fifteen arpents below the plaintiff's mills.

That they had made a dam across the river, and in January, 1857, had raised the dam, and by means of their works caused the water to flow back so as to impede the plaintiff's mills, and had maintained the dam and used their saw mill, notwithstanding the remonstrances and protests of the plaintiff, and to his damage to the extent of £2000. Conclusion that it be declared that the defendants had no right to erect the saw mill or any mill on the lot, and for the demolition of the dam, and for damages.

The plea set up that the mill was built by *Pichette* on his own lot, that as proprietor *riverain* he had a right to build it, and to make use of the water; that under the laws in force, the condition in his deed of concession, that no mill should be built was of no force, that the defendants had taken away a part of their dam in April, 1857, and that the plaintiff had sufficient water for his mills, and had suffered no damage. Conclusion for the dismissal of the action : answer general.

A large number of witnesses were examined.

SMITH, Justice.—Held, that the plaintiff was precluded by the statute 20th. Vict. cap. 104, from his action *en démolition*.

The statute was in some respects confused, but he held the defendants had a right to build a mill and make use of the water running past their mill, but were respon-

able for any damage thereby caused to the plaintiff : *expertise* ordered.

Jugement.—La Cour.... Considérant que le demandeur n'a pas établi qu'il eut un droit exclusif à l'usage des eaux de la rivière mentionnée ; et qu'aux termes du statut 20me Vict. cap. 104, intitulé.....les défendeurs étaient autorisés à utiliser et exploiter le cours d'eau qui borde leurs propriétés à cet endroit, et a y construire la dite digue ou chaussée, mais qu'en utilisant et exploitant le dit cours d'eau, les défendeurs sont néanmoins garants de tous dommages qui pourraient en résulter à autrui, soit par la trop grande élévation des écluses, ou autrement, ordonne avant faire droit, que par experts etc.

CHERRIER, DORION and DORION, for plaintiff.

BONDY and FAUTEUX, for defendants.

SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, Justice.

No. 1617. { DOUTRE, *Plaintiff*
 { vs.
 { GREEN, *Defendant.*
 { and
 { POLICO, *ès qua*..... *Opposant.*

The real estate belonging to the community of property formerly existing between the defendant and his late wife, was sold by the sheriff in an action brought by the plaintiff as representing the *bailleur de fonds*; in which action the defendant was condemned personally, and as tutor to his minor children, jointly and severally, to pay to the plaintiff £45 10, one half of the capital of the *bailleur de fonds* claim, which, with interest and taxed costs, amounted to £131. 10. 11. The children, as representing their mother, intervened by their tutor *ad hoc*, and contested the collocation of the plaintiff to the extent of £51. 13. 3, on the ground that one half of the monies belonged to them, and that they were only liable for one half of the capital and interest, and not for any costs.

Held :—That the contestation was unfounded.

Les propriétés immobilières de la communauté qui avait existé entre le défendeur et sa défunte femme, furent vendues par le shérif dans une action portée par le demandeur comme représentant le *bailleur de fonds*; dans laquelle action le défendeur fut condamné personnellement, et comme tuteur à ses enfans mineurs, solidairement, à payer au demandeur £45 10. moitié du capital de la réclamation du *bailleur de fonds*, laquelle, avec intérêt et dépens, s'élevait à £131. 10. 11. Les enfans, comme représentant leur mère, intervinrent par leur tuteur *ad hoc*, et contestèrent la collocation du demandeur jusqu'à concurrence de £51. 13 3, pour la raison que moitié des argens leur appartenait, et qu'ils n'étaient responsables que pour moitié du principal et des intérêts, et non pour les frais.

Jugé :—Que la contestation n'était pas fondée.

Judgment rendered the 30th. November, 1860.

In this cause the plaintiff filed an opposition claiming by privilege of *bailleur de fonds* certain monies out of the proceeds of the real estate sold by the sheriff, as representing one Mullins, the vendor of the lot to the defendant, by deed of the 18th. February, 1857.

The plaintiff also claimed by his opposition monies due under a notarial obligation, with mortgage by the defendant personally, and as tutor to his minor children, in favor of the plaintiff, of the 21st December, 1858, the claim of the plaintiff amounting in the whole to £183 1 9.

The judgment in the cause for which execution issued, was rendered against the defendant personally, and as tutor, jointly and severally, for £45 10, with costs.

An opposition was also filed, by one Elrige, claiming a

builder's privilege for [the balance of the price of certain buildings erected on the lot. After an *expertise* the plaintiff was collocated for £51 13 3, the value of the ground, and Elrige was collocated for £160 7 11, being the balance of the monies (£233 2 10) levied in the cause, after payment of costs, and of the amount of an opposition for assessments filed by the Corporation of the City of Montreal. Both collocations were contested by Pollico as tutor *ad hoc* to the minor children, issue of the defendant's marriage with his late wife, but the contestation of the plaintiff's collocation only came up for decision.

This contestation set up that the total *bailleur de fonds* claim of the plaintiff was £91, with interest from 21st. December, 1858.

That from the whole of the monies levied, £233 2 10, the minors were entitled to one half £116 11 5. From which deducting, as payable by the minors, without costs, say £45 10, left a balance of £71 1 5, for which the contestant prayed to be collocated, *es qualité*.

The plaintiff answered that every part of the land was hypothecated for the whole debt of the *bailleur de fonds*, and that the capital, £91 with interest, and taxed costs of suit, amounted in all to £131 10 11, and that even if the whole sum for which he was collocated was paid over, it would be less than half of the debt due by the minors.

BADGLEY, Justice.—Held that the contestation was manifestly unfounded.

Judgment.—“Considering....that the said contestant hath not established any right of contestation against the claim of the said plaintiff to be collocated as such *bailleur de fonds* upon the proceeds, doth dismiss the contestation with costs.”

DOUTRE and D'Aoust, for plaintiff.

BOVEY, for defendant.

CARTER and GIROUARD, for opposant.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 618. { PERRAULT,..... *Plaintiff.*
 vs.
 { MALO,..... *Defendant.*

The plaintiff leased to the defendant for several years certain premises for the sum of £570, the receipt whereof was acknowledged. The action brought was to have the leases set aside as fraudulent, the plaintiff alleging that the only amount which had ever been paid him was £37; that the contracts were usurious, and that there was *lésion d'outre moitié*.—The defendant pleaded a *défense au fonds en droit*.

Held :—That the parties must proceed to proof before adjudication on the *défense au fonds en droit*.

Le demandeur loua au défendeur pour plusieurs années, certaines propriétés pour la somme de £570, que le demandeur reconnut avoir reçus. L'action portée était afin d'obtenir la résiliation des baux comme frauduleux, le demandeur alléguant que le seul montant qui lui avait été payé était £37; que les contrats étaient entachés d'usure, et qu'il y avait lésion d'outre moitié.—Le défendeur plaide une défense au fonds en droit.

Jugé:—Que les parties devaient procéder à la preuve avant faire droit sur la défense au fonds en droit.

Judgment rendered the 31st. December, 1860.

The declaration of the plaintiff contained allegations to the following effect.

1o. That by deed of *donation entre vifs* of the 23rd. May, 1855, duly enregistered, Auguste Perrault the elder, made over to his children, accepting thereof, with charge of substitution, the usufruct of certain lots of land; that amongst other lots which were so given to the plaintiff as one of the children, was a lot of land in the city of Montreal, with a two story brick house and other buildings thereon.

2o. That the donation was so made *à titre d'aliments*, and under the express condition that the *fruits, rentes et revenus* should be employed for *aliments*, and should not be subject to seizure for any cause whatever.

3o. That by deed of lease of the 10th. November, 1856, before notaries, the plaintiff declared to have leased to the defendant the brick house on the lot described, for four years, from the 1st. May, 1857, for the sum of £120, acknowledged in the lease as paid; and by another lease of the 26th. June, 1856, before the same notaries, the plaintiff declared to have leased to the defendant the same house

for fifteen years from the 1st. May, 1861, in consideration of £450, also acknowledged in the lease as paid.

40. That the only two sums of money lent and advanced to the plaintiff by the defendant, were the sum of £25 paid at the time of making the first lease, and £12 paid at the time of the making of the second lease, and that the pretended amounts acknowledged to have been received by the plaintiff in and by said deeds of lease, were false, and that the said defendant never paid him, the said plaintiff, any other or larger amount than £37 cy.

50. That the leases were so made for the corrupt purpose of covering the usurious rate of interest to be charged, and actually charged, by the said defendant for the loan of the said two sums, and that the acknowledgment of the receipt of larger sums were false and introduced by the defendant for the purpose and object of obtaining the said property from the said plaintiff for a long term of years for a ridiculous and nominal amount.

60. That the alienation of the said property in virtue of the said two leases was contrary to the terms of the donation hereinbefore in part recited, and was unlawful, fraudulent and null, and, moreover, that the said property was so obtained *par lésion d'oultre moitié*, the consideration for the said alienation of the said property under the form of the leases aforesaid, paid by the defendant, not amounting to one tenth part of the value thereof.

70. That the house had been sublet by the defendant since the 1st. May, 1857, for £30 cy. per annum, and was occupied by a good and solvent tenant, "and that the amount really due to the plaintiff is the sum of £533, which the defendant never paid him, and that the defendant hath already recovered the entire amount so advanced by him."

CONCLUSIONS.—That the leases be adjudged and declared to have been executed fraudulently, and to cover the corrupt usury as aforesaid, and as having been fraudulently executed *par lésion d'oultre moitié*; and further that the said leases be declared fraudulent and the

defendant ordered to deliver up the possession of the said property within fifteen days from the service of the judgment, the defendant having received the entire amount advanced by him to the plaintiff, with legal interest thereon from the period of the said loans, and that in the event of the Court considering the defendant entitled to any sum of money in addition to what he had already received, then and in that case, to be condemned to deliver up the possession of the said property so leased as aforesaid, within such delay as the Court should appoint; the said plaintiff previously paying such additional sum of money as the Court might order and direct, the whole with costs of suit.

To this action the defendant pleaded a *défense au fond en droit*, in support of which he urged the following reasons.

1o. That even if the leases were made to cover usurious interest the plaintiff had no action to annul the payment so made, or to obtain the rescision of the deeds which he might have made in execution of an usurious contract.

2o. That there was no allegation of how or in what manner the contracts were usurious, and in what the usury consisted.

3o. Because there was no allegation of how or in what manner the leases differed from the donation.

4o. Because the cancelling of leases could not be obtained for *lésion d'outré moitié*, and because there was no allegation of the value of the rent at the dates of the leases.

5o. Because no action lies of the nature of that brought by the plaintiff.

BERTHELOT, Justice.—Said that there was nothing in the defence to meet the allegations of fraud, and that the parties must be held first to proceed to proof.

Judgment.—“avant faire droit sur la demande, que les parties procèdent à la preuve.”

BETOURNAY, for plaintiff.

CHEBRIER, DORION and DORION, for defendant.

BEBORE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—LORD CHELMSFORD, LORD JUSTICE KNIGHT BRUCE, SIR EDWARD RYAN, LORD JUSTICE TURNER.

MARTIN, et al *Appellants.*

and

LEE, et qua..... *Respondent.*

Held :—1o. That the paramount duty of Courts in construing wills is to ascertain and give effect to the intention of the testator, to be collected from the whole will, and not from any particular word or expression which may be contained in it.

2o. That, in the case submitted, a legacy by which a testatrix made a bequest "to all her children, *living at the time of her decease,*" does not include her grand children, issue of one of her children who died before the making of the will.

Seemle.—That a more extensive signification is frequently given by the old french law which prevails in Canada to the word "enfants" than is generally given by the english law to the word "children."

Jugé :—1o. Que le premier devoir des cours en interprétant un testament est de rechercher et de donner effet à l'intention du testateur, telle qu'elle apparait de l'ensemble du testament, et non d'un mot ou d'une expression particulière qui peut s'y trouver.

2o. Que, dans l'espèce, un legs par lequel une testatrice légua "à tous ses enfants, *vivants lors de son décès,*" ne comprend pas ses petits enfants, issus de l'un de ses enfants décédé avant l'exécution du testament.

Il semble.—Qu'une signification plus étendue est fréquemment donnée par l'ancien droit français qui est en force en Canada au mot "enfants" que n'est généralement donné par la loi anglaise au mot "children."

Judgment delivered the 6th. of February, 1861. (1)

This is an appeal from a decree of the Court of Queen's Bench in Lower Canada, affirming a decree of the Superior Court of that province. The only question raised by this appeal upon which their Lordships think it necessary to give any opinion, is the question upon the construction of the Will of Jane Gilley, the testatrix in the cause in Canada, from which the appeal arises. Jane Gilley, the testatrix, was, at the date of her will, and at the time of her death, the wife of George Black. She was a spinster when she married him; she had, at the date of her Will, five children living, the issue of her marriage with George Black—three sons, George, Edmund and James; and two daughters, Isabella and Elizabeth. She had another child, the issue of the same marriage, a daughter, Ann,

(1) 9 L. C. Rep., p. 376.

who had been married, in the year 1841, to Thomas Conrad Lee, and had died on the 20th. March, 1842, leaving issue of her marriage a child, Ann Lee, the plaintiff in the suit in Canada, who was born on the 5th. March, 1842. She herself died on the 13th. February, 1845. Her son George afterwards died on the 27th. August, 1849, leaving four infant children, all of whom are still living, and one of whom was born before the date of Jane Gilley's will. Her will, which was dated the 24th December, 1844, was, so far as is material, in these terms :—

Thirdly.—“ I do hereby give and bequeath unto George Black, my beloved husband, the use, enjoyment; and usufruct during his life of all my property, moveable or immoveable, goods, chattels, moneys, and other things which may belong to me at the time of my decease; the present gift of the usufruct of my property I, however, make to my said husband, on the express condition that he shall not marry again, and in case of his marrying again a second time, the present legacy of the usufruct of my property shall from that day cease and determine.

Fourthly.—“ I do hereby give, devise and bequeath all my share in the books on the science of ship-building or naval architecture, drawing instruments, moulds for drawing, and models belonging to my husband, to my two sons, Edmund and James Black, provided they shall follow the same business of ship-building carried on by my husband; and in case only one of them should follow the same business of ship-building, then the said books, instruments, moulds and models, shall belong to him alone; and in case none of them follow the said business, then the same shall belong to my eldest son George.

Fifthly.—“ I do hereby give, devise and bequeath, unto all my children issue of my marriage with the said George Black, *living at the time of my decease*, by equal portions between them, all and singular the property, moveable or

immoveable, goods, chattels, moneys, wares, or merchandize, or other things, which may in any way belong to me at the time of my death, hereby instituting my said children my sole and universal legatees without any reserves or exceptions, excepting that my said husband shall use and enjoy the same during his lifetime, and that my said children shall take possession of the same only after his death.

Sixthly.—“I order, will and direct, that none of my said property be partitioned or divided between my said children until the youngest of them shall have attained the age of twenty-one years.

Seventhly.—“It is my wish, order and direction, that if my said husband should die before all our children shall be of age, that in such a case all the moveable property should be sold by auction to the highest bidder, and the proceeds lent out at interest upon good security, and the immoveable property leased until the time the youngest child becomes of age, the lessee to be bound to keep and maintain the whole in good order and condition, reasonable tear and wear excepted; and that out of the proceeds of the revenues or rents of the whole a sufficient sum be first taken out to educate and bring up in a proper manner the youngest of the children, and the residue to be divided between the others, advising my said children not to disagree between themselves, and to take time to divide judiciously my property.

Eighthly.—“I do hereby nominate and appoint the said George Black, my husband, to be the executor of this my last will and testament, in whose hands I hereby divest myself of the whole of my property according to law, hereby willing and directing that his executorship shall not end at the expiration of a year and a day after my decease, but that he shall continue and remain as such executor, with all powers and rights thereunto appertaining, until the full, entire, and complete execution of the present will, and of all matters and things therein con-

tained ; and it is my wish and desire that my said husband, George Black, should be appointed tutor to our minor children.

Ninthly and lastly.—“I hereby revoke and annul all other or former wills or codicils which I may heretofore have made to the prejudice of the present one, to which I stand as being my true last will and testament.”

George Black, the husband of the testatrix, died on the 19th. May, 1854. The suit in Canada was instituted in the year 1857, by Thomas Conrad Lee, as the tutor of Ann Lee, his daughter, against the surviving children of the testatrix, and the widow and children of George Black, the son, claiming, on behalf of Ann Lee, to be entitled to a share of the testatrix's estate, under the dispositions in favour of her children contained in her will. The judges, both in the Superior Court and in the Court of Queen's Bench, with the exception of a single Judge in the latter Court, have been unanimous in favour of the claim of Ann Lee, and the decrees under appeal have been in her favour accordingly.

Their Lordships, after having fully considered this case, find themselves unable to agree with the conclusion at which the Courts in Canada have arrived upon the construction of the will. That a more extensive signification is frequently given by the old french law which prevails in Canada to the word “enfants” than is generally given by the english law to the word “children,” their lordships do not doubt ; but they are satisfied that by the old french law, no less than by the english law, the paramount duty of the Courts in construing wills is to ascertain and give effect to the intention of the testator or testatrix, to be collected from the whole will, and not from any particular word or expression which may be contained in it : and extensive as has been the signification which the old french law has in many cases given to the word “enfants,” their lordships accordingly find that in cases where

it has sufficiently appeared that that word was intended to embrace only the first generation of issue, it has been so confined in construction, of which the following case is an exemple : *Invitatis ad fidei commissum liberis qui ex Titio et Sempronia nascerentur, soli primi gradus liberi non etiam nepotes invitati videntur, quia licet liberorum appellatione continentur adeoque filiorum cum de favore et commodo ipsorum agitur, illud tamen non minus verum quam tritum est, articulo ex non nisi proximam et immediatam causam significari ; ut perinde sit ac si fidei commissum iis duntaxat relictum esset, qui ex Titii et Semproniæ corporibus nascerentur, quo casu apertius est vocatos eos videri non posse qui non ex Titio et Sempronia sed ex eorum liberis suscepti essent.* This case is to be found in 4 Burge's Comments., 567, but their lordships refer to it only by way of example. There are many other cases to the like effect to be found in the books. The true question, therefore, in this case is, not whether the word "enfants" may include grandchildren, and even more remote descendants, but whether, upon the true construction of this will, it was intended to include them, and their lordships are perfectly satisfied that it was not so intended by the testatrix.

It appears to their lordships to be clear that throughout this will the testatrix was referring to her own children, and to her own children only. She gives a life-interest to her husband in all her property, plainly looking to him for the maintenance of the children, for she provides against the event of his marrying again, and provides also for the maintenance of the children in the event of his dying before they should be of age. Again, the children to take are to be children of her marriage, and they were to be living at her death ; which at least tends to show that she could not be referring to her daughter, whom she must of course have known to be dead. Her husband, too, was to be appointed tutor to her children. These indications of the testatrix's intention are, in the judgment of their lordships, abundantly sufficient to countervail the ge-

neral force of the word "enfants," and are so manifest that their lordships feel bound to give effect to them. They have dealt with this case upon the footing not only that it ought, as of course it ought, to be decided according to the law of Lower Canada, but that according to that law it ought to be disposed of as it has been in the Courts there, upon the footing of the will being rendered into French, and the word "children" read "enfants;" but their lordships desire to be most distinctly understood as not having intended to decide that the case ought to have been dealt with upon that footing. That mode of dealing with the case is open to all the inconveniences pointed out by Mr. Justice Story, in his invaluable work, on "The Conflict of Laws," secs. 275 and 276, and by Lord Lyndhurst in his judgment in *Trotter vs. Trotter* (4 Bli, N. S. 505); and it may well be that this will having been written in the english language, the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the english law, was the meaning of the word "children," as used in the will, the law of the domicile, according to which the case must, of course, be decided, resorting to the foreign law or language for the purpose of deciding the meaning of the words used in the will. This, however, is a question of great importance, more especially having regard to the number of foreigners domiciled in this country, and of englishmen domiciled abroad, who may prepare their wills in their native languages; and their lordships are anxious to be understood as having given no opinion upon the point, which was not, indeed, fully argued. It is sufficient to say that, taking the case in the view most favourable to the respondent, the judgments of the Courts in Canada cannot, in their lordships' opinion, be supported.

They will, therefore, humbly recommend to Her Majesty to reverse the decree of the Court of Queen's Bench, and to substitute for it a decree dismissing the suit without costs, and to give no costs of the appeal.

CHAPMAN, et al...... *Plaintiffs*
vs.
NIMMO, *Defendant.*
and
THE PHOENIX ASSURANCE Co...... *Garnishees.*

Le défendeur résidait à Brantford dans le Haut-Canada, les demandeurs le poursuivent dans la Cour Supérieure à Montréal, l'action fut commencée par un writ de saisie-arrest entre les mains de la Compagnie d'Assurance les Phoenix, le défendeur ayant été sommé sous les provisions de la 121ème Vic. chap. 38, sec. 84, comparait par procureur et plaida par exceptions dilatoire et à la forme.

Jugé :—Que les tiers-saisies lors du service du writ sur aux étant endettés au défendeur en une certaine somme d'argent, les demandeurs avaient droit de poursuivre le défendeur dans le district de Montréal, et que les deux exceptions devaient être déboutées.

Judgment rendered 31st December, 1860.

In this cause a writ of *saiste-arrét* before judgment was issued on the 5th. March, 1860, which was served on the same day on the *tiers saisis* by delivering the same to the manager of the company at their place of buisness in Montreal, between four and five of the clock in the afternoon. The *tiers saisis* appeared and made their declaration to the effect that they had nothing in their hands belonging to the defendant, adding: "And states that a claim for \$4000 was due to James Nimmo, Jr., by the *tiers saisis*, but previous to the service of the writ of attachment in this cause, the agent of the *tiers saisis* at Brantford, Canada West, had been instructed to pay it, which he did on 6th. March instant by a draft on Messrs. Gillespie, Moffatt & Co., the general agents of the said *tiers saisis*, at three days sight."

The defendant being called in by the usual notice, appeared by counsel and filed a *declinatory exception*,

also an *exception à la forme*, based upon allegations that he had no domicile or property in Lower Canada; that his domicile was at Brantford, in Canada West; that the cause of action did not arise within Lower Canada, and that no legal service of process was made. After the issues on these pleadings were completed the case was inscribed for *enquête* on both exceptions; the only witness examined was James Davison, manager, in Montreal, of the Assurance Company; he was called by the plaintiffs.

It appeared from his deposition that the writ was served upon the witness at forty minutes past four o'clock in the afternoon, that at two o'clock in the afternoon of the same day, and without any knowledge of the suit, the witness telegraphed to the Brantford agent of the company to pay the defendant his claim of \$4000, which was done by draft dated the 6th. March, and which, it is the "impression" of the witness, was made payable to the defendant; receipt was taken at Brantford on the 6th., as for a cash payment, the draft was paid on the 8th. March by Gillespie, Withall & Co., at Montreal.

The fire by which the loss occurred took place in February previous, and the loss had been reported upon and was ordered to be paid. The witness also stated the defendant's domicile to be at Brantford, and that he was not aware of his having any real or personal estate in Lower Canada, except the \$4000.

Judgment :—" Considérant qu'il y a preuve que le 5 mars, 1860, jour de l'émanation du writ en cette cause, et lors de la signification qui en a été faite aux *tiers saisis*, il était encore alors dû par eux au dit défendeur une somme de \$4000, et que par conséquent les dits demandeurs avaient alors le droit de poursuivre le défendeur dans ce district, déboute l'exception à la forme et l'exception déclinatoire plaidées par le défendeur, avec dépens.

ABBOTT and DORMAN, for plaintiffs.

MACRAE, for defendant.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents : —SIR L. H. LAFONTAINE, Bart., Juge-en-Chef,
AYLWIN, DUVAL, MEREDITH et C. MONDELET, Juges.

HAGAN..... *Appelant.*
et

WRIGHT..... *Intimé.*

Jugé :—1o. Qu'un transport fait par un débiteur à des syndics pour le profit de ses créanciers, ayant été depuis résilié à la suite du paiement des dettes, ce débiteur est rentré en pleine possession de tout ce qui pouvait rester des biens par lui transportés, soit en nature, soit en deniers réalisés ou en créances en provenant ; et qu'il peut en obtenir le recouvrement en justice, même contre les tiers, sans avoir signifié le jugement de rétrocession, sauf la question des frais sur cette demande.

2o Que, dans l'espèce, le défendeur qui avait acquis des syndics et redevait une balance, ayant contesté entièrement la demande, sans faire aucune offre réelle, doit être condamné aux dépens.

Held :—That an assignment made by a debtor to trustees for the benefit of his creditors, subsequently resiliated by reason of the payment of his debts, is entitled to be replaced in full possession of the remainder of the effects assigned, as well those that remain, as the monies, proceeds of those sold ; and that he is entitled to recover such effects, even in the hands of third parties, without notification of the judgment awarding him the effects, saving the question of costs upon the recovery.

2o. That, in the case submitted, the defendant who had purchased from the trustees, and who owed a balance, having contested the whole claim, without making any tender, must be condemned to pay costs.

Jugement rendu le 7 décembre, 1860.

L'intimé se trouvant dans l'impossibilité de rencontrer ses engagements, fit, par un acte reçu en mars, 1851, un transport des biens y désignés, à MM. Gilmour, Allan et Alex. Workman, en qualité de syndics, pour le bénéfice de ses créanciers, avec pouvoir de vendre, et l'obligation de remettre au cédant le surplus des biens, après les frais d'administration et les dettes acquittées.

Le 10 mars, 1854, ces syndics agissant par le dit A. Workman vendirent à l'appelant un terrain faisant partie des biens de l'intimé, pour la somme de £175, payable au dit Alex. Workman, ou autres représentant de l'intimé. (the respondent's estate)

Toutes les dettes de l'intimé ayant été acquittées, il poursuivit les syndics pour se faire rétrocéder ce qui restait

de ses biens, et obtint un jugement, en la Cour Supérieure à Montréal, le 27 juin, 1857, qui les condamnait à lui en passer un titre, et à lui remettre tout ce qui leur restait en mains comme reliquat ; et la Cour ordonnait en même temps, qu'à faute par les syndics de consentir et exécuter tels actes, le jugement en tiendrait lieu.

C'est sous ces circonstances que l'intimé poursuivit l'appelant pour recouvrer de lui la somme de £50, balance qu'il redevait sur son acquisition du 10 mars, 1854.

A cette demande, l'appelant plaida d'abord par une défense en droit, et ensuite par une exception, dans laquelle il alléguait qu'il s'était engagé de payer à Alex. Workman, et non à l'intimé ; que le jugement du 27 juin, 1857, n'avait aucun rapport avec son prix de vente, vu que cette créance n'avait jamais été transportée par l'intimé aux syndics, mais avait été créée par ces derniers longtemps après le transport par l'intimé.

L'appelant ne mit pas en cause ses vendeurs, et n'alléguait pas non plus le transport de ce qu'il devait, à aucun des créanciers de l'intimé.

Le jugement rendu par la Cour de Circuit du district d'Ottawa, sans égard à la défense de l'appelant, prononça en faveur de l'intimé, mais ne contient aucun motivé.

La Cour du Banc de la Reine, saisie de cette cause sur l'appel qui en a été interjeté, n'a pas hésité à confirmer le jugement de la Cour de Circuit, considérant qu'elle n'avait pas mal jugé.

AYLEN, P. pour l'appelant.

McCord, pour l'intimé.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents :—Sir L. H. LAFONTAINE, Bart. Juge-en-Chef,
 AYLWIN, DUVAL, MEREDITH et BRUNEAU, Juges.

FOOTNER..... *Appelant.*
 et

JOSEPH..... *Intimé.*

Jugé :—Qu'un architecte nommé dans un bail d'ouvrage pour la construction de maisons, a droit de recouvrer du propriétaire une rémunération pour ses services, non à titre de commission, mais comme *quantum meruit*.

Held :—That an architect named in a contract for the building of houses, has a right to recover from the proprietor compensation for his services, not by way of commission, but by way of *quantum meruit*.

Jugement rendu le 7 décembre, 1860.

Le 17 mars, 1854, par acte reçu devant notaires, John Ostell s'obligea de construire pour l'intimé huit maison sur *Union Avenue*, suivant les devis et spécifications faits par l'appelant, désigné comme "*the architect of the said buildings*," et ce, pour le prix et somme de £2450, payable chaque mois au fur et à mesure de l'exécution des ouvrages et livraison des matériaux, et suivant les certificats du dit appelant.

En décembre, 1857, l'intimé réclama de l'appelant, par une action portée devant la Cour Supérieure à Montréal, la somme de £96. Les causes de la demande étaient énoncées comme suit :

" For the price and value of certain work and labour
 " previously done and performed by plaintiff, as an archi-
 " tect, for the defendant, at Montreal, in and about, and
 " upon, the building of a certain block of houses, in the
 " said city of Montreal, and for drawing plans and specifi-
 " cations for the same, and for superintendance in the
 " building of said houses, and for *commission* as custo-
 " mary in like cases and usual, to wit, upon the amount
 " expended upon said houses at the special instance and
 " request of defendant, the whole as per statement and

“ account herewith filed.... and in a like sum of money
 “ for work and labor, care, diligence and attendance of plain-
 “ tiff done and performed for defendant, at his request and
 “ for his advantage.”

Le compte produit avec la demande était pour £96, tant pour avoir pris les instructions du défendeur, que pour avoir mesuré le terrain, fait les plans et estimés des ouvrages, préparé le devis des ouvrages et les avoir surveillés depuis le commencement jusqu'à l'exécution—sur le pied d'une commission de 4 pour cent sur £2400 de déboursés.

Le défendeur plaida qu'il n'avait jamais employé le demandeur comme architecte ; il répéta cette même dénégation dans ses réponses aux interrogatoires sur faits et articles, alléguant dans ses réponses qu'Ostell n'était qu'un prête-nom, et que Footner était le véritable entrepreneur.

Ostell examiné comme témoin déclara que l'appelant n'avait jamais retiré un sou de ce que l'intimé lui avait payé ; le fait du travail et de la surintendance de l'ouvrage était établi, et l'appelant avait également établi l'usage d'une rémunération en forme de commission variant de 3 à 5 pour cent.

L'intimé sous serment dit qu'il n'avait jamais payé plus de 2½ pour cent aux architectes par lui employés.

La Cour Supérieure par son jugement du 30 avril, 1859, débouta l'appelant.

“ Considering that the plaintiff hath not proved and es-
 “ tablished the material allegations of his declaration, and
 “ namely, that he has against defendant any right of ac-
 “ tion for a commission of four per cent, as in and by his
 “ declaration and action alleged and claimed, and the
 “ Court considering that the plaintiff hath not proved and
 “ established that he had any legal right to recover of and
 “ from the defendant any sum of money for the causes in
 “ said declaration setforth, and claimed by the present ac-
 “ tion, doth dismiss &c.”

De ce jugement Footner interjeta appel à la Cour du Banc de la Reine, et en obtint l'infirmité. (1)

MEREDITH, J.—Il s'agit dans cette cause de savoir quelle peut être la responsabilité de celui qui fait construire, envers l'architecte employé à surveiller les travaux, lorsqu'il n'y a aucune convention entr'eux, pour ma part je suis d'opinion qu'il n'est pas nécessaire qu'il y ait un contrat ou une convention formelle pour lier le propriétaire ; il y a dans cette cause des faits suffisants pour justifier une condamnation contre l'intimé, et je donnerais jugement en faveur de l'appelant.

AYLWIN, Juge.— La question en cette cause n'est pas de savoir s'il y a lieu d'accorder une commission ou non. Il est évident que des services ont été rendus par l'appelant à l'intimé, et la seule question est de savoir si ces services sont appréciables à prix d'argent, cette Cour est d'opinion que ces services sont appréciables, et que l'appelant avait droit d'en être payé. Le jugement de la Cour de première instance avait pour objet principal d'établir que la *commission* ne peut être regardée comme une règle pour fixer la rémunération due à l'architecte employé à surveiller des travaux de construction. La Cour n'entend pas contredire la décision sous ce point de vue, et en fixant la rémunération due à l'appelant, elle n'adopte le chiffre de 2½ pour cent que parce que l'intimé n'a fait aucune preuve pour établir la valeur particulière des services rendus par l'appelant, qui lui de son côté a prouvé un *quantum meruit*. Le jugement de la Cour de première instance est donc infirmé et l'appelant recouvrera la somme de £55 pour sa rémunération

McKAY et AUSTIN, pour l'appelant.

DORION, DORION et SENÉCAL, pour l'intimé.

(1) Autorités citées par l'appelant :

6 Toullier, p. 39, nos. 32, 33 : — Wardle appt. et Moir intimé : — Domat art. 1. liv. 1, tit. 1, sec. 1, no. 10 : — Pothier, Louage, no. 40 : — Troplong, Louage, t. 1. sec. 3 : — Bell's Princip. of Laws of Scotland, nos. 176, 182.

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge

No. 1168. { LA BANQUE DE QUÉBEC..... Demanderesse.
vs.
{ MAXHAM *et al.*..... Défendeurs.

Jugé :—Qu'un verdict prononcé par un jury en matière civile en des termes qui suivant le langage grammatical sont ambigus, peut-être interprété par la Cour de manière à lui donner effet, et que pour cet objet la Cour peut s'aider des lumières que lui offre la preuve, et de l'interprétation que la partie elle-même a donné aux expressions qui sont la cause de l'ambiguïté apparente du verdict.

2o. Qu'un créancier en possession de deniers appartenant à un tiers, ne peut les appliquer au paiement d'un billet promissaire auquel le tiers apparaît comme endosseur, si le billet a été retiré par le faiseur au moyen d'un check sans valeur.—Que le seul recours dans ce cas consiste dans une action spéciale.

Held :—1o. That a verdict rendered by a jury in a civil cause in terms which in a grammatical sense are ambiguous, may be interpreted by the Court in such way as to give it effect, and that the Court may for that purpose look to the evidence, and ascertain the interpretation which one of the parties has given to the expressions which are the cause of the apparent ambiguity of the verdict.

2o. That a creditor in possession of moneys belonging to a third party, cannot apply them to the payment of a promissory note upon which such third party appears as indorser, if such note has been retired by the maker by means of a check without value.—That the remedy must in such case be by special action.

Jugement rendu le 1er. octobre, 1860.

TASCHEREAU, Juge.—Cette cause m'est soumise, 1o. par les demandeurs sur motion pour jugement en leur faveur, sur le verdict du jury. 2o. Sur application pour jugement contre le défendeur, P. Chartré, après inscription et audition finale au mérite sur l'issue avec ce dernier. 3o. Sur une motion par les défendeurs, Maxham, *et al.*, pour jugement en leur faveur sur le verdict du jury. Ce simple exposé démontre que les demandeurs et les défendeurs interprètent le verdict comme leur étant respectivement favorable.

Le dossier en cette cause fait voir, que le 13 septembre, 1858, le défendeur, Chartré, fit, avec le commissariat de Sa Majesté à Québec, un marché par lequel il s'obligeait de fournir, moyennant rémunération, toute la viande de bœuf qui serait nécessaire pour les troupes royales ; que Chartré, convaincu que par ses propres ressources il ne pouvait rencontrer ses engagements en vertu de ce contrat, s'a-

boucha avec les deux autres défenseurs, Maxham et Budden, et leur demanda de l'aide, ce qui fut fait par ces messieurs, qui, le 8 octobre, 1858, adressèrent à la banque la lettre suivante, savoir :

Quebec, 8th. October, 1858.

Gentlemen,

We have been requested by Mr. P. Chartré, to ask if the Bank would take up his account for the government contract in the supply of beef, and advance him the funds on discounting the paper of A. J. Maxham & Co., he, Chartré, transferring the proceeds of each month's delivery to the Bank, or in other words, the Bank only to receive the money. The amount required would not exceed £2000, but, for the fall, in order to secure the supplies for the winter, he would require £4000. That is between this and the 1st. of December next. The payments in all instances have been regularly met, and he at present has paid up every note due that was advanced for said contract for the past year, which expired on the 30th., amounting to £15000; waiting your reply this day in the Bank, as to whether you will take the whole amount or part, and grant a discount to day of £500.

(signed) A. J. MAXHAM & Co.

En conséquence de cette lettre, la banque, à une assemblée de ses directeurs, tenue le même jour, déclara accéder à cette proposition, à la condition qu'un transport des deniers payables par le commissariat à P. Chartré serait consenti en faveur de la banque, et qu'une police d'assurance serait effectuée sur le bœuf pendant l'hiver. Le transport fut exécuté le 16 octobre, 1858, et accepté par le caissier, Mr. Gethings, au nom de la banque, et fut signifié de suite aux officiers du commissariat, mais il n'appert pas que la police d'assurance sur le bœuf ait été prise. On voit que depuis le mois d'octobre, 1858, jusqu'au mois d'octobre, 1859, vingt-sept billets de A. J. Maxham & Cie., en-

dossés par Chartré, furent escomptés par la banque à un montant de 38,538¹¹/₁₆ dollars, et des checks du commissariat à un montant de 34,152¹¹/₁₆ dollars, furent reçus à la banque comme provenant des argents de Pierre Chartré en vertu de son contrat susdit, et furent mis à son crédit, savoir, au crédit de Chartré, tel que le constate Mr. Gethings, et dont le livre de banque privé de Chartré fait aussi foi. On ne voit pas comment il se fait que ces argents aient ainsi été mis au crédit de Chartré, ou au moins avec le pouvoir d'en disposer comme bon lui semblerait, et il me semble qu'en cela il y a eu une déviation du contrat originaire que les demandeurs doivent expliquer. Il est constaté que le billet dont il est question en cette cause, forme partie des avances faites à Chartré comme susdit. Les choses se continuent ainsi, savoir, Maxham & Cie. signent des billets à l'ordre de Chartré, celui-ci les endosse et les fait escompter à la banque qui en porte le produit au crédit de Chartré, ainsi que les recettes du commissariat et tout autre argent de Chartré. Il paraîtrait que dans le cours de cette année, (savoir d'octobre '58, à octobre '59,) il y aurait eu entre Maxham & Cie., et le caissier de la banque, une conversation à l'effet suivant, savoir, que Mr. Gethings s'étant aperçu qu'en plusieurs occasions Chartré était venu à la banque dans un état d'ivresse, il (Mr. Gethings) en avait informé M. Maxham et lui avait demandé s'il devait continuer à porter au crédit de Chartré, comme d'ordinaire, les argents qu'il recevait pour lui, et que M. Maxham répondit, oui, et qu'il avait confiance en Chartré, ou quelques mots à cet effet, et qu'en conséquence, pour retirer les argents, Chartré tirait son check sur la banque, le faisait accepter par cette dernière et allait le mettre entre les mains de Maxham & Cie., qui le déposait à leur crédit dans la banque, et rachetaient ainsi leurs billets. Telle fut la transaction jusqu'au 4 octobre, 1859, jour auquel Chartré tire un check de \$4200 sur la banque, le fait accepter, et au lieu de le mettre en mains de Maxham & Cie., le transporte dans une autre banque,

en reçoit la valeur, et laisse Maxham & Cie., à réfléchir sur leur sort. Le même jour Maxham & Cie., croyant que Chartré leur remettrait le check de \$4200, et sans attendre qu'il leur fût mis en mains, tirent leur propre check pour ce même montant de \$4200 pour rencontrer, 1o. un billet personnel de \$200, 2o. quatre billets au montant de \$4000 par eux signés dans l'intérêt de Chartré. L'officier de la banque sans s'assurer de l'existence de fonds pour rencontrer ce check, l'approuve, et sur présentation d'icelui à un autre des employés de la banque les billets sont remis à Maxham & Cie. L'erreur se découvre peu de temps après, et Maxham & Cie., informés des procédés plus qu'extraordinaires de Chartré se rendent à la banque et lui adressent une lettre conçue en ces termes :

Quebec, 5 October, 1859.

To the President and Director of the Quebec Bank. }

Gentlemen,

In consequence of M. Pierre Chartré having drawn from the bank the proceeds of the money received from the government contract, and appropriating that money to himself, and not to the retirement of our notes amounting to \$4500 due yesterday, we beg to state that we are unable for the present to meet them, and request you will retain such sum or sums as he may have to his credit, received by you from the commissariat on account of his indorsations on said paper remaining in your hands.

(Signed) A. J. MAXHAM, & Co.

A cette époque, savoir, le 5 octobre, 1859, il y avait entre les mains de la banque, au crédit de Chartré, une somme de \$1539.⁰⁰, dont \$1530.⁰⁰ provenant des deniers reçus du commissariat.

Plus tard, vers la fin d'octobre, 1859, la présente action est instituée par la banque contre les trois défendeurs pour

le recouvrement du billet de \$2000, en date du 5 août, 1859, signé par A. J. Maxham & Cie., à l'ordre de Chartré, et payable à 2 mois, et le billet est admis être comme tous les autres une suite du contrat auquel j'ai fait allusion.

Maxham & Cie. ont divisé leur défense de celle de Chartré ; outre une défense au fonds en fait, Maxham & Cie. ont plaidé par exception péremptoire, qu'à l'époque de l'échéance du billet en question, la banque avait en mains une somme de \$1500 des argents de Chartré, reçus par elle du commissariat, et spécialement destinés à rencontrer les billets de A. J. Maxham & Cie., endossés par le dit Chartré en exécution de la convention exprimée en la lettre du 8 octobre, 1858, ci-dessus citée, et ratifiée par la banque ; qu'ils avaient offert à la banque la somme de \$460⁰⁰, suivant leur protêt du 10 octobre, 1859, pour balance du montant du billet, et concluaient par l'offre d'une confession de jugement pour cette somme de \$460⁰⁰, avec intérêt et frais jusqu'au 25 novembre, 1859, et que les frais subséquents à ce dernier jour fussent adjugés contre les demandeurs en cas de refus d'accepter la dite confession. J'observerai en passant que cette confession est insuffisante et aurait dû être pour \$500. La banque a répondu d'une manière générale à l'exception de Maxham & Cie. L'autre défendeur a plaidé à l'action par une défense au fonds en fait. L'enquête a fait ressortir les faits ci-dessus, et le jury auquel l'issue entre la banque et Maxham a été soumise, a rapporté, en réponse aux questions, les déclarations suivantes, savoir, l'existence du contrat ci-dessus récité, les avances faites par la banque à Chartré sur les billets de A. J. Maxham & Cie., que le billet en question était un de ces billets, que la banque avait reçu du commissariat pour Chartré en différents temps \$34,152⁴⁷, et enfin qu'à l'époque de l'échéance de ce billet, la banque avait encore en sa possession une somme de \$1530⁰⁰ des deniers de Chartré, *applicable* (textuel) au paiement de ce billet.

Aujourd'hui, je suis appelé à faire droit sur les trois applications qui me sont soumises en cette cause, et dont j'ai déjà parlé.

Il s'élève deux questions.

1o. Si le verdict du jury est ambigu, doit-on l'interpréter de manière à lui donner suite, et puis-je pour cela m'aider des lumières que peut m'offrir le témoignage en la cause.

2o. Quel est le verdict que le jury a donné, et doit-il recevoir son exécution.

Je n'hésite pas à répondre affirmativement à la première question.

Pour répondre à la deuxième question, je dois consulter les questions soumises aux jurés, leurs réponses, expliquer ces dernières les unes après les autres, et enfin consulter le témoignage.

Cette dernière question dénote assez qu'il y a dans la réponse quatrième du jury, une certaine ambiguïté, mais j'ose dire qu'elle n'est qu'apparente, et qu'elle disparaît bientôt en consultant la preuve.

Pour en venir à une décision, le jury a dû prendre en considération la lettre de A. J. Maxham & Cie. à la banque, contenant les offres de cautionnement de ces messieurs en faveur de Chartré, et l'engagement final contracté par la banque au moyen duquel elle devait recevoir les argents de Chartré pour sa sûreté et celle de Maxham & Cie., et le jury a pu dire en toute vérité que le billet de \$2000 a pu être payée au montant de \$1530 par une somme égale à ce montant, alors entre ses mains et appartenant à Chartré. Il est vrai que la banque prétend qu'elle n'avait aucun contrôle sur ces deniers puisqu'ils étaient au crédit de Chartré, qui devait seul en avoir la disposition, mais la banque oublie que par ses réponses sur faits et articles, et notamment par sa réponse à la cinquième question, elle prétend en même temps que ces \$1530 devaient être par elle retenus pour faire face aux quatre billets échus le

4 octobre, 1859, et que M. Maxham a retirés par un check sans valeur ; et ne peut-on pas lui dire que si elle pouvait appliquer ces \$1530 au paiement des quatre billets échus le 4 octobre, elle pouvait et avait le même droit de les appliquer au paiement du billet en litige en cette cause. Je suis d'opinion qu'elle le pouvait pour les uns comme pour le dernier billet, malgré l'espèce de contrôle qu'elle avait promis à Chartré d'exercer sur ses deniers, et dans ce cas, qu'elle est la conséquence de ce droit ? Au paiement de quel billet ces \$1530 doivent-ils être appliqués ? On ne peut dire que ce soit aux quatre billets échus le 4 octobre, 1859, car ils sont payés quant à ce qui regarde Chartré, attendu qu'il n'y a pas eu de protêt contre lui, et qu'il n'en résulte, contre Maxham & Cie., qu'une action fondée sur ce check sans valeur par lui donné pour racheter les quatre billets du 4 octobre. D'ailleurs, une raison qui dans mon opinion milite très fortement contre le droit de la banque d'imputer ces \$1530 au paiement des quatre billets, c'est que la banque n'a pas invoqué ce droit au moyen d'un plaidoyer spécial, et n'a pas plaidé l'existence de ces billets, qui n'apparaissent dans la cause que par hasard, et incidemment, et j'avoue que j'aurais refusé au procès la permission de faire preuve de ces billets, sur le principe qu'ils ne furent pas plaidés spécialement. En vain dira-t-on que Maxham & Cie. ont reconnu verbalement, et par écrit, que Chartré avait seul le contrôle de ses deniers : car, à part le fait du livre privé de banque de Chartré sur la tenue du quel Maxham & Cie. n'avaient aucun contrôle, la seule preuve à cet égard est celle donnée par M. le caissier Gethings, et j'avoue que malgré la haute respectabilité de ce monsieur, la loi m'oblige de déclarer que son témoignage doit être reçu et accepté avec prudence, en raison de la responsabilité qui pèse sur lui en faveur des demandeurs par suite de cette déviation apparente du contrat original entre les parties. On ne peut invoquer la lettre du 8 Octobre, 1859, contre Maxham & Cie., parcequ'il faut la prendre en son entier. Maxham & Cie., on pu, dans l'excitation du moment, écrire cette lettre, mais en

même temps ils insistent que la banque retienne la balance entre ses mains pour payer leurs billets échus le 4 octobre, 1859. Comme je l'ai dit, le seul billet auquel cela peut s'appliquer est le billet en litige en cette cause, car les autres ne sont pas censés exister : s'ils existent, les questions qui devront surgir sur l'effet légal du paiement de ces quatre billets par un check sans valeur, devront être décidées dans une autre action, telle qu'on voit que les demandeurs ont déjà portée contre Maxham & Cie. Le jury en déclarant que la somme de \$1530 restant entre les mains de la banque à l'échéance du billet en litige était applicable au paiement essentiel de ce dernier billet à voulu dire, et a, de fait, dit, que ce billet était payé et satisfait d'autant. J'avoue que la phraséologie de la réponse 4^{me}, qui seule est susceptible de doute, n'est pas ce que l'on eut pu attendre d'un jury composé d'hommes de loi, mais, suivant moi, cette réponse est en parfaite unisson avec le langage habituel du commerce, qui, dans le jury en question, se trouvait représenté par douze des citoyens de Québec les plus éclairés, et les plus capables de rendre justice aux parties intéressées. J'ajouterai que les demandeurs dans leur réponse 5^{me} aux interrogatoires sur faits et articles, font usage du même mot *applicable*, dans le même sens que celui donné par moi au verdict du jury. J'interprète donc le verdict du jury comme clairement énonçant que le billet en question a été acquitté au montant de \$1530^{AA}, et vu la plaidoirie des défendeurs limitant ce paiement à \$1500, je suis d'opinion que ce verdict doit recevoir son exécution, et que crédit doit être donné aux défendeurs de cette somme de \$1530, et la demande réduite d'autant.

Quant au défendeur Chartré, il n'est pas possible de prononcer contre lui, qui n'est que la caution ostensible de ce billet comme endosseur, une condamnation plus onéreuse que celle qui doit être prononcée contre les débiteurs principaux.

En conséquence je déclare que l'offre de la confession

faite par les défendeurs, Maxham et Cie., au montant de \$460 A. n'est pas suffisante, et qu'elle aurait dû être de \$500, et je maintiens la motion des demandeurs pour jugement contre les défendeurs, conjointement et solidairement, pour la somme de \$500, avec intérêt du 8 octobre, 1859, et les dépens, et deux piastres pour frais de protêt, mais comme les demandeurs ont nié le paiement des \$1530, ils supporteront les frais de l'enquête des défendeurs, nécessaire pour cette preuve, à être taxés ; et je renvoie la motion des défendeurs, sans frais.

STUART et MURPHY, pour la demanderesse.

LEMOINE, pour Maxham *et al.*

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice, and a SPECIAL JURY.

No. 1784. { CLARK *et al.*,..... Plaintiffs.
vs.
MURPHY *et al.*,..... Defendants.

Held :—That the verdict of a jury finding that a creditor who, after notice of dissolution by the retirement of one of the partners, continues the business with the new firm, and, upon their becoming insolvent, gives them delay for payment without making reference in any way to the retired partner of the old firm, thereby discharges the old firm and such retired partner thereof, as to the liability of the old firm ; will be set aside, and judgment entered for the plaintiffs, *nonobstante veredicto*, if the evidence upon which the said verdict was based was entirely contained in written correspondence, although carried on for a period of two years ; if it appear to the Court by the construction to be put upon the letters that there was no intention to discharge the old firm.

Jugé :—Que le rapport d'un juré à l'effet qu'un créancier qui, après avis de la dissolution de société par la retraite de l'un des associés, continue les affaires avec la nouvelle société, et, lors de leur insolvabilité, leur donne du délai sans nullement faire mention de l'associé qui s'est retiré de la première société, libère cette société de toute responsabilité et aussi l'associé qui s'en est ainsi retiré ; sera déclaré nul, et jugement sera rendu en faveur des demandeurs, *nonobstante veredicto*, si la preuve sur laquelle tel rapport a été fait résulte entièrement d'une correspondance écrite, nonobstant qu'elle ait duré pendant deux ans ; s'il appert à la Cour que par le sens qui doit être donné aux lettres il n'y avait pas d'intention de libérer l'ancienne société.

Judgment rendered the 4th. February, 1861.

The case was tried before a special jury on the 28th. May, 1860, the facts of the case were as follows :—

The plaintiffs carrying on business at Boston, in the month of December, 1856, sent a consignment of fish to the defendants, who were carrying on business as Commission-Merchants at Chicago, under the name of Murphy, Noad and Co., for sale on account of the plaintiffs, at 5 per cent for commission and guarantee. Up to the 13th of March following, the defendants had disposed of a portion of the consignment, to the value of \$552, of which \$7 were paid in cash ;—on this day, according to the following letters addressed to the plaintiffs, they dissolved partnership :—

“ CHICAGO, March 13th, 1857.

Messrs. Clark and Woodward,

Dear Sirs,—Since our last, we regret we cannot advise much progress in sales of your mackerel. The trade is dull, but several of our dealers will be out of stock in a few days when something may be done. In consequence of other arrangements our firm is this day dissolved. W. S. Noad assumes the business, and will apprise you of the change. Unless advised to the contrary, the new firm will follow present instructions existing touching the disposal of your property.

Thanking you for past favors to us,

We are, &c.,

(Signed,) MURPHY, NOAD AND Co.”

“ NOTICE.

“ The co-partnership heretofore existing between the undersigned, under the name and style of Murphy, Noad and Co., is this day dissolved by mutual consent. All debts due to or by the said firm will be settled by W. S. Noad.

(Signed,) O. MURPHY,
W. S. NOAD.”

—Chicago, 13th March, 1857.

"The business heretofore carried on by the late firm of Murphy, Noad and Co., will be continued by the subscriber under the name and style of W. S. Noad and Co.

(Signed,) W. S. NOAD."

Chicago, 13th March, 1857.

—
"CHICAGO, 13th March, 1857.

Messrs. Clark and Woodward,

Dear Sirs,—Referring to the above notices we respectfully solicit a continuation of the favors granted to the late firm, assuring you that no exertions shall be wanting, on our part, in protecting the interests confided to our care, and in giving general satisfaction to our friends.

We are, &c.,

(Signed,) W. S. NOAD AND Co."

—
Upon which the plaintiffs replied as follows :—

"BOSTON, March 23rd, 1850..

Messrs. Murphy, Noad, & Co.

CHICAGO.

Gentlemen,—We have your valued favour of 13th. instant, also notice of dissolution of copartnership which we regret to hear, but we hope it was for your mutual interest, and we wish you all much prosperity and would be glad to be of service to you. We shall be glad to get account sales of our fish, as soon as possible, as they keep many of our old accounts open, please close up at once if possible. We shall be glad to hear from the new firm with prices of fish, also what can be done with new mackerel, cod fish, &c.

Yours truly,

CLARK AND WOODWARD.

Messrs. Clark and Woodward,

Dear Sirs,—We are in due receipt of your respected favor of 23rd instant. We are doing our very best to close your consignment of fish, and hope soon to wait on you with account sales.

Fish is very dull of sale and would not recommend your sending any more before the present lot is disposed of.

Good Codfish will sell for \$4,75, and we have been obliged to have the whole of your Mackerel overhauled, as our merchants would not buy without our guaranteeing them.

You may depend on our closing your sales of fish as soon as we possibly can.

We remain, &c.,

(Signed,) W. S. NOAD AND Co."

Hereupon followed several letters extending over the summer of 1857, in which the plaintiffs requested W. S. Noad and Co., to close up the old account, and in which W. S. Noad and Co. promised an early remittance, alleging the dullness of the times, &c., as the cause of their delay; and enclosed the plaintiffs an account sales headed as follows:—"Account sales Fish received, and sold per order and for account of Messrs. Clark and Woodward, Boston," in which the plaintiffs were credited for net proceeds in the sum of \$502 00, and were informed that they, W. S. Noad and Co., had closed business in Chicago, and intended removing to Toronto, and had handed the balance of the consignment to one Hall for disposal. Upon this the plaintiffs write requesting W. S. Noad and Co. to sell the balance of the consignment at Chicago for what it would bring, in order to get an end of the affair, and remit proceeds. In October and November W. S. Noad and Co., replied that they were unable to meet their liabilities or remit the \$502 00, amount

of account sales, owing to several bad debts, and offered their notes for the amount at 6 and 9 months with interest, which the plaintiffs agreed to take. On the 5th of June, 1858, the plaintiffs wrote as follows :—

“ W. S. Noad and Co.,

To Clark and Woodward, Drs.

To nett sales Mackerel as per acct. sales rendered,

cash, 19th June, 1857..... \$479 19

Interest on do. to 19th June, 1858..... \$27 84

Interest on \$239 59 from 18th June to 5th

August..... 2 24

30 08

\$509 27

Our Draft 3 days sight for..... \$254 63

Do. 60 do. for..... 254 64

\$509 27

Boston, June 5, 1858.

Messrs. W. S. Noad and Co.,

Dear Sirs,—We have not heard from you for some time. In November 5, 1857, you stated to us that you wanted 6 and 9 months time on our drafts. We did not get your notes as proposed at that time. You will, above, receive memorandum of account ; first payment would have fallen due 5th May last ; for this we have valued on you at three days sight, and second payment falls due 5th August, for which we have valued on you at 60 days, which please protect. We hope times have improved very much.

Your obedient servants,

(Signed,)

CLARK AND WOODWARD.”

The plaintiffs not having been paid, in the month of December, 1859, instituted the present action against the defendants, as composing the old firm of Murphy, Noad and Co., for the sum of \$502 00 being the net proceeds of the sales of the consignment up to the dissolution of the said firm, on the 13th March, 1857.

The defendant Noad made default, but Murphy, the other defendant, pleaded, firstly, the general issue ; and secondly, that the plaintiffs had knowledge of the dissolution of the partnership between the defendants, and accepted the new firm of W. S. Noad and Co., as their sole debtor for the liabilities of the old firm, and had released the defendant Murphy, who, from the time of the dissolution of the partnership, had ceased to reside in Chicago, and had been carrying on business on his own account in Quebec.

The case came on before STUART, Justice, and a SPECIAL JURY.

The question submitted to the Jury was :—" Did the plaintiffs release Murphy from his obligation to pay the sum demanded, and accept the said W. S. Noad and Co. as sole debtor of the same ?"

HOLT, for defendant Murphy,—addressed the Jury, contending, that from the above correspondence it was perfectly manifest that the intention of the plaintiffs was to release Murphy from the obligations of the old firm, and that they had accepted the new firm as their sole debtor, and had consented to look to the new firm alone for the payment of the debt ; that it was not necessary that a release to a partner should be absolutely expressed, it was sufficient if it could be implied from the nature of the correspondence.—(1)

He maintained that from the nature of the correspondence in this case, no other conclusion could be arrived at,

(1) Pothier, Obligations, p. 292, no. 594 :—Merlin, Répertoire, vbo. Délégation de dette, p. 425 :—Guyot, Répertoire, vbo. Délégation de dette, p. 251 :—3 Kent's Commentaries, p. 69 :—Addison on Contracts, p. 1006 :—6 Nouveau Denisart, vbo. Délégation de dette, p. 139 :—Hart vs. Alexander, 2 Meeson and Welsby, p. 494 :—7 Carrington and Payne, p. 746 :—15 English Law and Equity Reports, p. 70 :—Collyer on Partnership, pp. 325, 326 and 327 :—Cases of David vs. Ellis and Lodge vs. Titus, Collyer on Partnership, pp. 328 and 330 :—27 English Common Law Reports, p. 242 :—Story on Partnership, pp. 206 and 7, § 155 :—1 Smith's Leading Cases, p. 252, in notes.

than that it was the intention of the plaintiffs to release Murphy; and observed that the circumstance of their having given delay to the new firm, was a significant fact as bearing upon their intention to release Murphy.

ANDREWS, in reply, argued that the question submitted to the jury, was one rather of law than of fact, and ought, therefore, more properly to have been left to the decision of a Judge than of a jury.

That where a third person is accepted to pay the debt of another, if such third person does not pay the debt the creditor can fall back upon his original debtor, unless it can be clearly shewn that in accepting the third person as his debtor, he had also discharged his original debtor; and that in such case the intention to discharge the original debtor, must be either expressed or clearly implied. (1)

That it could not be concluded from the correspondence in this case that the plaintiffs ever intended to discharge Murphy, on the contrary, they had always intended to hold him liable and look to him for payment, if his late partner—the new firm, should fail to do so; that they urged payment of the new firm because they had been informed that firm was, as agent, to wind up the concerns of the old one; that the plaintiffs had no object in releasing Murphy, seeing that when he dissolved partnership with Noad, he had pocketed half the proceeds of their goods, and the commission for selling them, and now when called upon for payment, he turned round and said: “Oh, I am released because I have dissolved partnership with Noad, and because you have given him delay to pay the amount.” That the delay given by the plaintiffs was a strange complaint for Murphy to make, because at the time that Noad asked for delay, the plain-

(1) Pothier, Obligations, no. 699:—1 Smith's Leading Cases, pp. 442, 455.—15 Law and Equity Reports, pp. 70 and 72:—Collyer on Partnership, sec. 530 and 531, 467 and 464:—Smith's Law of Contracts, pp. 423, 346:—Pothier, Contrat de Société, no. 173:—Perrin, Sociétés Commerciales, no. 11, p. 84:—3 Chitty's Commercial Law, p. 248.

tiffs, instead of granting it could then have sued Murphy, and compelled him to pay the amount. That a responsible partner could not step out of a firm and leave consignors and creditors to look to a man of straw.

STUART, Justice, charged the jury, and after going over the proceedings in the cause observed, that the case presented no complexity, the defendants as partners had received on consignment and sold for the plaintiffs certain merchandize to the amount demanded, and it was intended by that action to compel payment from both defendants, one of them, Murphy, pleaded that the plaintiffs released him and accepted Noad as their sole debtor,—the only question submitted to the jury was whether the plaintiffs had so released Murphy and had accepted Noad as their sole debtor of the sum demanded,—there was no evidence of any express agreement to discharge Murphy, but it was contended that this release could be fairly inferred from the correspondence. He said that it was fitting to observe that the defendants upon dissolving their partnership gave notice of it to the plaintiffs, and at the same time informed them that Noad was authorised to collect the debts and liquidate the liabilities of the late firm. After this notice the plaintiffs addressed their correspondence principally, if not altogether, to Noad. From this circumstance no inference could fairly attach of any intention to release Murphy, no allusion whatever is made to him in it, the question was a simple one and such as they, commercial men, would have little difficulty in making up their mind upon.

The jury, after deliberating about half an hour, returned the following verdict :—The jury is of opinion that the plaintiffs released Murphy, and accepted W. S. Noad, by the tenor of their correspondence with W. S. Noad and Co., especially by their letter addressed to the latter after removing to Toronto, and from the fact of their having rendered account current to W. S. Noad and Co., direct,

and agreed to accept their notes at long dates, as payment in full, without any reference to Murphy."

On the 1st. June, 1860, the plaintiffs, pursuant to notice, moved that the verdict entered for Owen Murphy, one of the defendants in the cause, be set aside, and a judgment given against him, *nonobstante veredicto*. Because the said verdict was rendered contrary to law, without evidence to support it, and was given upon a question of law not within the cognizance of, or by law determinable by a jury, but a question for the judge, inasmuch as it was one of a pretended contract and agreement between the plaintiffs and the said Owen Murphy, the proof whereof altogether depended upon the interpretation of written documents, the construction of which by law is solely within the province of the judge, and there was in truth no fact to go to the jury; and because although the case tried by the said jury as it presented itself at the opening of the trial was apparently a proper one for their consideration, inasmuch as it was competent to the defendant, Owen Murphy, to have adduced oral testimony of the allegations of his plea, yet it ceased so to be when the said defendant closed his case without presenting any other than documentary evidence, and the judge presiding at the trial should then have withdrawn the question altogether from the jury, and not have allowed them an opportunity of finding in favor of the said defendant, Owen Murphy, in defiance of the evidence given in the cause; and because the verdict as rendered being subversive of the law, the Court had, then a right to adjudicate upon the evidence in the cause, and reverse the finding of the said jury, and by law ought so to do.

ANDREWS, Senior, urged all the grounds set forth in the motion, and argued he was borne out by decisions to the effect that where the question was one of law, and not one of fact, the case should not have been submitted to the jury, but should have been withdrawn from their consideration

and adjudicated upon by the Court, that the present case had presented the novel spectacle of counsel turning from the Court to address a jury upon a question of law little understood by them. (1)

That the construction of written documents is purely matter of law. (2)

That Court can set aside verdict and give judgment for opposite party. (3).

Anderson vs. Quebec Fire Assurance Company, verdict for defendant, judgment upon it reversed and judgment for plaintiff in appeal; as in Gibb vs. Beacon Insur., verdict for defendant set aside and judgment for plaintiff.

Holt, for Murphy, in reply argued that the case was eminently one for a jury; that the intention to release was a matter of fact; that the correspondence furnished the declarations of the parties, which was proper to be weighed by the jury;—that no witnesses had been examined because the admissions filed had rendered the examination of witnesses unnecessary, and the case must be looked at in the same way as if witnesses had been actually examined.

STUART, Justice.—Granted motion and gave judgment against both defendants, jointly and severally, for amount demanded.

ANDREWS and ANDREWS, for plaintiffs.

HOLT and IRVINE, for Murphy.

(1) 23 Eng. C. L. Reports, 273 :—37 Eng. L. and. Eq. Repts., p. 251 :—Ib. vol. 14, p. 435 :—Ib. vol. 30, p. 508.

(2) 1 Starkie on Evid., p. 525 :—1 Taylor on Evid., p. 50, sec. 36.

(3) 5 L. C. Repts., p. 145,—Ferguson vs. Gilmour, verdict for plaintiff set aside and action dismissed.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 913.—*Ex parte*—WARNER, for writ of *Certiorari*.

In an action for wages as a sailor on board a barge.

Heid :—10. That the Inspector and Superintendent of Police for the city of Montreal has the same powers as two Justices of the Peace.

20. That as seamen have a *lien* and a right *in rem* for their wages, the registered owner was liable for wages accrued up to the date of his purchase.

30. That, moreover, the applicant was bound to have set forth in his plea the name of the party from whom he bought the barge.

40. That the defect in the summons which set forth that the barge was duly registered in the province of Canada, was cured by the conviction which stated the barge to be duly registered in Lower Canada.

Dans une action pour gages par un matelot à bord d'une barque.

Jugé :—10. Que l'inspecteur et surintendant de police pour la cité de Montréal a les mêmes pouvoirs que deux juges de paix.

20. Qu'en autant que les matelots ont un gage et un droit *in rem* pour leurs gages, le propriétaire sur le registre était responsable pour gages échus jusqu'au jour de son acquisition.

30. Que, de plus, le requérant était tenu d'alléguer dans son plaidoyer le nom de la personne de laquelle il avait acheté la barque.

40. Que la défectuosité dans la sommation qui alléguait que la barque avait été dûment enregistrée dans la province du Canada, était écartée par la conviction que constatait que la barque avait été dûment enregistrée dans le Bas-Canada.

Judgment rendered the 31st. October 1860.

In this case a motion was made for a writ of *Certiorari* to remove a conviction by C. J. Coursolles, Esq., Inspector and Superintendent of Police for the city of Montreal, condemning the applicant to pay Joseph Bérard the sum of \$34 60, for balance of wages as sailor on board the barge *Atélaide*, from the 12th. August to the 20th. September, 1860.

The writ of summons was dated on the 17th. September, 1860, and the barge was therein alleged to be duly registered in the province of Canada.

The affidavit of circumstances set up that the applicant appeared; and pleaded that he was not the owner of the barge at the time the services were rendered; that he bought the barge from a person whom he did not name, on the 19th. September, 1860, and was not liable for wages, and that the action should have been brought against the former owner.

• That as seamen have a *lien* and a right against the vessel (*in rem*) for their wages, the registered owner was liable for wages accrued up to the date of his purchase.

CARTER, for applicant. .

SUPERIOR MONTREAL.—MONTREAL.

No. 2582. { DAVID,..... *Plaintiff.*
 { VS.
 { McDONALD, *et al.*..... *Defendants.*

Jugé :—Qu'en vertu du statut de la 23ème Vic., cap. 57, sec 51, un co-défendeur peut être examiné comme témoin par un autre co-défendeur.

This was an action of damages against McDonald *et al*, builders, and Hopkins *et al*, architects, jointly and severally, for damages alleged to have been sustained by the plaintiff by reason, as it was alleged, of

the sinking of the floors in a shop belonging to the plaintiff ; McDonald *et al*, had done the work, and the architects had made the plans. The defendants severed in their defence, and on one of the builders being brought up at *enquête* as a witness for the architects, an objection was taken by the plaintiff which was ordered by Mr. Justice SMITH to be heard in term.

BERTHELOT, Justice.—I have consulted with my brother judges and we hold that under the recent statute any co-defendant can be examined. This was almost admitted by the plaintiff's counsel as being the interpretation to be given to the statute in question." (1)

Judgment, that examination of witness be proceeded with.

BETHUNE and DUNKIN, for plaintiff.

McKAY and AUSTIN, for McDonald *et al*.

ROBERTSON, A. and W. for Hopkins *et al*.

(1) " And any person who may be challenged as a witness on the ground of being interested, may give evidence in Courts of Justice, but the evidence of such witness shall have its weight with the judge, according as he may be deemed entitled to credibility." 23rd. Vic. cap. 57 sec. 51.

" Any party in a cause may be summoned and examined as a witness by any other party in the same cause, and the party, so summoned and examined, may be cross-examined as a witness by his own attorney, if he be so represented, and the evidence given by any such party may be made available to the party obtaining it, or not, as he may think proper, provided that he declare his intention, at the close of his *enquête*, to avail himself of such evidence or not; but no such evidence shall be turned to the advantage of the party giving it."

" Every party so summoned shall be taxed as any other witness." 23rd. Vic. cap. 57, sec. 49 :—Consol. Stats. L. C. p. 698.

SUPERIOR COURT.—MONTREAL.

Before :—MONK, Justice.

No. 1459. { WHEELER, et al..... Plaintiffs,
vs.
BURLITT, et al,..... Defendants.

Held :—That in an action against a married woman described as *séparée de biens*, the production of notarial deeds in which the defendant takes the quality of *femme séparée de biens* from her husband, is not sufficient evidence of such separation, if the separation be denied by the plea.

Jugé :—Dans une action contre une femme mariée alléguée être séparée de biens, que la production d'actes notariés dans lesquels la défenderesse s'était qualifiée de femme séparée de biens d'avec son mari, n'est pas preuve suffisante de telle séparation, si la séparation est niée par le plaidoyer.

Judgment rendered the 29th. September, 1860.

This was an action against a married woman alleged to be separated as to property from her husband. The plea denied such separation, and the evidence in relation to this point consisted of interrogatories *sur faits et articles* put to defendants, who denied the separation, and of certain notarial deeds produced at *enquête* by the plaintiffs, in which the defendant took the quality of *femme séparée de biens*. This proof was held insufficient and the action dismissed.

Judgment.—Considering, “that it is not proved that the “said Sarah Burkitt was at the time of the institution of “this action, or at any previous time, separated from her “said husband, the Court doth dismiss the plaintiffs’ action with costs.”

JUDAH, for plaintiffs.

MONK, for defendants.

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 1709. { HARPER, Demandeur,
vs.
BILODEAU, Défendeur.

Jugé :—1o. Qu'un confesseur peut recevoir un legs de son pénitent.

2o. Que toutes restrictions qui ont pu exister à l'égard du confesseur en pareil cas, sous le régime du droit Français, ont été levées par l'acte de la 41me. Geo. III, chap. 4. (1)

Held :—1o. That a confessor may receive a legacy from his penitent.

2o. That any disabilities which may have existed with regard to the confessor in such case, under the old French law, have been removed by the act 41st. Geo. III, cap. 4.

Jugement rendu le 4me. jour de Mars, 1861.

The details of the case, in which the plaintiff instituted an action *en délivrance de legs* for the recovery of a legacy made in his favor by a deceased penitent, towards whom he had, for years, acted as confessor and spiritual director, are sufficiently stated in the judgment of the learned judge which is given at full length. All the facts having any bearing upon the merits of the case will be found clearly set forth.

TASCHEREAU, Juge.—Le demandeur, Messire Jean-Baptiste Harper, curé de la paroisse de St. Grégoire, réclame de la défenderesse la délivrance d'un legs d'une rente annuelle qui lui est accordé par le testament de feu dame Marie Louise Langlois, veuve de feu Louis François Bilodeau, en son vivant de la Petite-Rivière St. Charles, passé à Trois-Rivières, le 1er Mai, 1846, pardevant M^{re}. Lottinville et confrère, notaires publics. La demande de délivrance de legs est faite à la défenderesse comme seule enfant et héritière naturelle de la testatrice.

Je dois remarquer en passant que la testatrice fait un legs particulier à la défenderesse de £15 0 0 de rente annuelle et viagère, institue pour légataires universelles ses deux petites filles (Mesdames Falardeau et Rousseau) et confie l'exécution de ses dernières volontés à M. Valère Guillet, notaire à Trois-Rivières.

(1) Statute Consol. B. C. chap. 34, sec. 27, p. 321.

La défenderesse a plaidé pour défenses :

1o. Une défense en droit alléguant que la demande en délivrance de legs aurait dû être portée non seulement contre l'héritier légal, mais contre les légataires universels, et contre l'exécuteur testamentaire.

Cette défense en droit fut renvoyée sur le principe que l'action ne mentionnant pas de légataires universels ni d'exécuteurs testamentaires, la Cour ne pouvait prendre connaissance que des allégations de la déclaration. Mais la question se trouve soulevée de nouveau à l'audition finale au mérite, et cette Cour est appelée à en faire droit.

2o. La défenderesse, par exception péremptoire en droit perpétuelle, a plaidé : —1o. Que le demandeur, longtemps avant l'exécution du testament, lors d'icelui et jusqu'à la mort de la testatrice avait été le confesseur et directeur spirituel de la testatrice, qui demeurait chez lui, et que, comme tel, il ne pouvait légalement recevoir le legs qui lui avait été fait.—2o. Que la testatrice à l'époque de son testament était âgée de 78 ans, n'était pas saine de mémoire, jugement et entendement, et conséquemment qu'elle était incapable de tester.—3o. Que la testatrice avait été induite en erreur et trompée par le demandeur et autres personnes, et que son testament lui avait été suggéré par le demandeur dans des vues d'intérêt personnel. Qu'elle n'avait pas compris ce testament, et que par suite d'un complot tramé d'avance elle avait été engagée à déshériter ses enfants, et que le testament était fait contre ses intentions constatées par cinq testaments et codiciles antérieurs, dans lesquels elle exprimait la volonté de laisser à ses enfants tous les biens lui venant du chef de son mari, comme les siens propres.—4o. Que l'actif de la succession se montait à £1560 environ, que le legs du demandeur, en outre d'un autre legs de £700 qui lui est fait par le même testament, forcerait les légataires universels à vendre à sacrifice les immeubles de la succession.—5o. Que ce testament est fait *ab irato*, a été dicté par le demandeur, et à elle im-

posé par l'influence que le demandeur exerçait sur elle.— Que le testament n'a pas été fait, dicté et lu en présence de deux notaires.—60. La défenderesse se plaint que le demandeur ne demande par son action que la délivrance du legs de £200, et qu'il ne parle pas du legs de £700.

Il s'élève en cette cause les questions suivantes de droit et de fait.

10. L'action aurait-elle dû être portée non seulement contre l'héritier légal, mais contre les légataires universels et l'exécuteur testamentaire ?

20. Comme confesseur habituel et directeur spirituel de la testatrice avant le testament, à l'époque d'icelui et jusqu'au décès de la testatrice, le demandeur est-il disqualifié à recevoir le legs particulier qui lui est fait ?

30. La testatrice était-elle saine de mémoire, jugement et entendement à l'époque de la confection de son testament ?

40. Le testament lui a-t-il été suggéré, l'a-t-elle compris ; a-t-elle été induite en erreur par suite de quelque complot tramé par la fraude et la cupidité ?

50. Ce testament est-il l'effet de la passion et de la vengeance ; en un mot, est-il fait *ab irato* ?

60. Le testament est-il revêtu des formes légales ?

70. Le fait que le demandeur ne fait demande dans son action que du legs de £200, tandis qu'il a droit à un autre legs de £700 peut-il militer contre son droit d'action ?

Pour résoudre la première question qui se rapporte au droit du demandeur d'instituer son action contre l'héritier seul sans y joindre les légataires universels et l'exécuteur testamentaire, il faut référer d'abord à l'ancien droit coutumier qui nous régit encore à ce sujet, à moins qu'il n'ait été rappelé ou modifié par notre loi statuaire—je veux parler du statut de 1801, qui, de prime abord, semble faire disparaître les droits du sang à l'hérédité, pour la donner

à un légataire. Par l'ancien droit, cette demande d'une délivrance de legs, qui ne pouvait se suppléer par aucune formalité, se donnait toujours contre l'héritier du sang, et pour cette bonne raison (et en vertu de la maxime, le mort saisit le vif,) que les héritiers du sang comme saisis de l'hérédité ont seuls le droit d'examiner le testament et d'en contester les dispositions. Comment peut-on faire cette demande au légataire universel qui lui-même, aussi bien que le légataire particulier, a besoin, pour se mettre en possession de son legs, d'en faire demande à ce même héritier qui est dépouillé de tout excepté de son titre. On peut ajouter comme motif que rien dans la plaidoirie ne constate que les légataires aient accepté le legs. Le légataire universel ne peut donc délivrer ce dont il n'est pas saisi, et ce qu'il est lui-même obligé de demander. Quant à l'exécuteur testamentaire, n'étant saisi d'une partie de la succession que pour certains objets, ne les possédant que pour l'héritier et comme son sequestre ou mandataire, on ne peut dire qu'il puisse faire une délivrance qui fortifierait celle que fait l'héritier que la loi saisit de toute la succession, et d'ailleurs le sujet du legs réclamé en cette cause est un immeuble dont l'exécuteur testamentaire n'est pas légalement saisi, et dont il ne peut faire délivrance au légataire ; mais on dit que par loi du Canada (41 Geo. III,) la faculté de tester a été tellement étendue que l'héritier du sang n'est plus considéré, et, qu'au contraire, le légataire universel, quel qu'il soit, lui est substitué, et est saisi de la succession par le seul effet de la volonté du testateur, et n'a pas besoin de demander délivrance de son legs. Je n'interprète pas ainsi la 41me Geo. III, dont le seul effet suivant moi a été d'étendre les pouvoirs du testateur et les capacités des légataires, et d'y faire disparaître un grand nombre d'incapacités jusqu'alors existantes vis-à-vis de certains légataires. Cette loi ne dispense pas le légataire de l'obligation où il était de faire reconnaître la validité du testament contradictoirement avec l'héritier du sang, en un mot de demander sa délivrance de legs.

La seconde objection soulevée par la défenderesse quant à la capacité du demandeur de recevoir un legs de celle dont il avait été le confesseur habituel et le directeur spirituel mérite une grande considération. On ne peut douter que par l'ancien droit français qui régissait ces matières avant le statut de 1801, un confesseur et directeur spirituel dans des circonstances analogues à celle de la présente cause aurait été déclaré disqualifié à recevoir ce legs, quoiqu'il n'y ait pas de texte spécial de la loi prononçant cette incapacité. On voit que ce n'est que par analogie et parité de raison que les commentateurs du droit français ont appliqué aux confesseurs et autres l'inhabilité de recevoir un legs, qui est prononcée contre les tuteurs et autres administrateurs par l'ordonnance de 1539, de François I. On voit même que dans certains cas les juges avaient droit d'admettre les confesseurs à la demande du legs, si le legs était minime, ou si les circonstances faisaient disparaître tout soupçon de suggestion. Mais cette jurisprudence a subi, suivant moi, une modification bien grande par la passage du statut de 1801, la 41me Geo. III, ch. 4. Je considère que ce statut a non seulement étendu les pouvoirs du testateur, mais fait disparaître toutes les disqualifications restrictives à l'égard de toutes les personnes ci-dessus mentionnées comme légataires. Les termes du statut sont si emphatiques et si clairs que je ne puis me dispenser de les réciter ici :

“ Il est par le présent statué qu'il est et sera loisible à
 “ toute personne ou personnes saines d'entendement et
 “ d'âge, usant de leurs droits, de léguer et disposer, par
 “ testament ou acte de dernière volonté, soit entre conjoint
 “ par mariage en faveur de l'un ou de l'autre des dits en-
 “ fants, soit en faveur de l'un ou de plusieurs de leurs en-
 “ fants à leur choix, ou en faveur de qui que ce soit, de
 “ tous et chacuns leurs biens meubles, ou immeubles, quel-
 “ que soit la tenure des dits immeubles, et soit qu'ils soient
 “ propres, acquets ou conquets, sans aucune réserve, res-
 “ triction et limitation nonobstant toutes lois, coutumes et
 “ usages à ce contraires. Pourvu aussi : que le droit de

“ tester, tel que dessus spécifié et déclaré, ne pourra être
 “ considéré s'étendre à donner pouvoir de léguer et donner
 “ par testament, ordonnance de dernière volonté ou en
 “ faveur d'aucune corporation ou autres gens de main
 “ morte, excepté dans les cas où telle corporation ou gens
 “ de main morte auront la liberté d'accepter et recevoir
 “ suivant la loi.”

Je suis confirmé dans cette interprétation de ce statut par l'opinion exprimée d'abord, par la Cour d'Appel de ce pays, et ensuite par celle du Conseil Privé de Sa Majesté, en mai, 1828, confirmant la décision de la Cour d'Appel dans la cause de Durocher et Beaubien, dont on trouve le rapport dans Stuart's Reports, page 307.—Je trouve une semblable interprétation dans le second volume du Jurist, page 141, Quintin dit Dubois et Girard, jugée en Cour d'Appel, composée des juges, Sir L. H. LaFontaine, Aylwin, Duval et Caron. Il fut décidé par cette Cour que le statut de 1801, avait introduit une liberté illimitée de tester. J'infère de toutes ces autorités que le confesseur, privé jusqu'en 1801 du droit de recevoir le legs de son pénitent, et aussi privé des droits dont il devait jouir comme citoyen, et frappé d'incapacité comme coupable de suggestions, a été rétabli par la loi dans tous ses droits de légataire.

Je dois donc dire que le demandeur n'est pas disqualifié à recevoir ce legs, comme ayant été le confesseur de la testatrice.

30. La troisième question relative au fait de savoir si la testatrice était saine de mémoire, jugement et entendement à l'époque de la confection de son testament, ne peut souffrir de difficulté, attendu qu'il est prouvé que cette femme, quoique assez âgée, jouissait de toutes ses facultés mentales à cette époque, et était conséquemment très capable de faire son testament.

40. La quatrième question qui est relative à la suggestion du testament n'est pas exempte de difficultés. Il suffit de remarquer que la testatrice laisse ses enfants à Québec

pour s'en aller demeurer chez le demandeur où elle passe plusieurs années de sa vie, y est bien traitée par les nièces du demandeur, qui lui-même l'appelle sa cousine, sans que l'on sache trop d'où vient la parenté, est la pénitente du demandeur, fait des dons très généreux à des communautés, et fait un testament par lequel elle lègue au demandeur £900 sur £1600 qui est l'actif de sa succession, fait d'autres legs aux parents du demandeur, et ne laisse à la défenderesse, sa fille, qu'une rente viagère de £15, et le résidu à ses petites filles comme légataires universelles. On doit noter que cette dame, de 1828 à 1849, a fait cinq testaments et codiciles, y compris celui dont il est question, et que par tous ceux qui précèdent le dernier elle n'avait pas oublié sa fille et ses petits-enfants, et que ce n'est qu'en 1849 qu'elle a changé ses intentions, prouvées d'abord par ses testaments et par les aveux qu'elle fit à diverses personnes. D'un autre côté dans tous les testaments antérieurs, la défenderesse n'a toujours eu qu'un minime legs de £12. On doit noter aussi que la testatrice se rend pour faire son testament chez un notaire qui était l'ami intime du demandeur, et chez lequel le demandeur allait souvent quand il allait à Trois-Rivières.

Le demandeur admet lui-même qu'il avait une grande influence sur la testatrice, et qu'il eut pu lui suggérer son testament s'il l'eut voulu, mais qu'il n'a jamais voulu l'entendre lui parler de son testament. Toutes ces circonstances pourront bien laisser dans mon esprit quelque doute sur la probabilité d'une suggestion d'un testament, mais d'un autre côté il n'y a rien de prouvé contre la conduite du demandeur ; au contraire, il semble, dans toutes les occasions, avoir évité de parler avec la testatrice de son testament. Tous les témoins s'accordent à considérer le demandeur comme un homme très pieux et très désintéressé, et la testatrice est prouvée, au delà de tout doute, avoir conservé jusqu'à sa mort un jugement des plus sains, une volonté des plus fermes, et une défiance assez prononcée. Quel motif a pu engager la testatrice à dépouiller ainsi

ses enfants pour l'avantage d'un étranger ? Question difficile à résoudre, et que la testatrice seule possédant son entier jugement a pu apprécier. Elle avait par la loi le pouvoir de tester comme elle l'a fait, et elle tenait d'elle seule la volonté de déshériter ses enfants. Il ne m'appartient pas de scruter ses motifs les plus intimes lorsque la preuve faite devant moi ne me convainc pas qu'on ait fait à son égard usage d'une influence étrangère et malhonnête pour lui dieter ses dernières volontés. Il y a plus, le demandeur produit, après la mort de la testatrice, une lettre de cette dernière, écrite et signée par elle, par laquelle elle retranche quelque chose du legs du demandeur, en le chargeant de payer des legs assez considérables envers d'autres personnes. Cette lettre, bien écrite, dénote chez la testatrice une volonté bien arrêtée de donner effet à son testament, et porte la date du 28 mai, 1850, (quinze mois après son testament) et la production de cette lettre par le demandeur qui pouvait la supprimer, dénote chez lui ce caractère de désintéressement que lui donne les témoins, car, en la supprimant, il s'exemptait, au moins suivant la loi, de payer près de quatre-vingt louis courant en legs.

50. La cinquième question, savoir si ce testament est fait *ab irato*, ne peut nous détenir longtemps. Indépendamment de la question de droit qui s'élève sur l'effet qu'aurait sur les dispositions de ce testament la preuve qu'il avait été fait *ab irato*, je dois dire qu'il n'y a nulle preuve d'aucun sentiment de haine ou de vengeance de la part de la testatrice contre ses héritiers, tout ce que l'on peut dire pour justifier ces dispositions, c'est que la testatrice, femme très pieuse, voulait faire, et a fait, des legs pieux, qu'elle recommande dans sa lettre du 28 mai 1850, au demandeur, d'employer son legs à des œuvres pies ; et de plus que la testatrice a pu se faire illusion sur la valeur de ses biens ; mais ce qui montre qu'il n'y a pas eu haine de sa part, c'est qu'elle donne à sa fille, la défenderesse, une somme de £15, somme plus considérable que celle qu'elle lui don-

nait par ses premiers testaments, et qu'elle institue ses petites filles légataires universelles.

Le testament est revêtu de toutes les formalités nécessaires et requises par la loi, et le fait que le demandeur ne fait demande que de son legs de £200, tandis qu'il pourrait faire demande en même temps de celui de £700, ne peut militer contre lui. Ce n'est pas un sujet de plainte que la défenderesse puisse proférer ; ce sera sur une autre action que la défenderesse aurait droit de se plaindre ainsi, si toutefois le demandeur juge à propos de le réclamer.

Pour toutes ces raisons je suis clairement d'opinion que le demandeur a le droit de son côté ; qu'il n'a rien fait pour le disqualifier à prétendre à la délivrance de son legs ; et j'ordonne en conséquence qu'il lui soit fait délivrance de son legs à toutes fins que de droit, mais sans dépens contre la défenderesse.

Le jugement de la Cour ordonne, en conséquence, *délivrance de legs*.

DELAGRAVE, pour le demandeur.

TESSIER, pour le défendeur.

SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, Justice.

No. 236. { GRANT, Plaintiff,
 vs.
 { THE ÆTNA INSURANCE COMPANY, Defendants.

LAW OF FIRE INSURANCE—JURY TRIAL—ADMISSION OF ILLEGAL AND
 REJECTION OF LEGAL EVIDENCE—CONTEMPORANEOUS REPRESENTATIONS
 BY INSURED TO OTHER INSURERS—VALUATION IN CASES OF LOSS—REPRE-
 SENTATIONS OR WARRANTY.

Held :—10. That letters written by the agent of the defendant, a Fire Insurance Co., to his principal after the loss had accrued, cannot be used in evidence against the company.

20. That contemporaneous representations made by the assured to other insurers of the same subject, may be legally proved by the defendants.

30. That the loss under a policy stipulating : " That the loss or damages shall be estimated according to the true and actual cost value of the property at the time the loss shall happen," must be ascertained from proof of the money value of the subject in the existing market.

40. That the following words written upon the face of the policy, " of the steamer Malakoff now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter at a place to be approved of by the company, who will not be liable for explosions either by steam or gunpowder," is a warranty and not a representation.

50. That such warranty not having been complied with by the assured, the policy is void, and an action for the loss will be dismissed upon motion, *non obstante veredicto*.

Jugé :—10. Que des lettres écrites par l'agent de la défenderesse, une société d'assurance, à son principal, après la perte arrivée, ne peuvent être produites en preuve contre la compagnie.

20. Que des représentations faites par la partie assurée à d'autres assureurs, peuvent être prouvées légalement par la défenderesse.

30. Que la perte sous une police d'assurance stipulant : " Que la perte ou les dommages seront estimés d'après la vraie valeur des effets assurés lors de telle perte," doit être constatée par preuve de la valeur en argent de l'objet assuré sur les marchés.

40. Que les mots suivants écrits sur la police d'assurance, " du vapeur Malakoff étant au bassin Tate, Montréal, et destiné à naviguer sur le St. Laurent et les Lacs de Hamilton à Québec, principalement comme bateau à fret, et qui sera mis en hivernement dans un endroit qui sera approuvé par la compagnie, laquelle ne sera pas responsable pour explosion par la vapeur ou par la poudre," constituent une garantie et non une représentation.

50. Que l'assuré ne s'étant pas conformé à cette garantie, la police est nulle, et une action pour la perte sera renvoyée sur motion, *non obstante veredicto*.

Judgment rendered the 31st. March, 1860.

BADGLEY, Justice :—Three motions have been submitted in this cause, the first in arrest of judgment, the second for entry of judgment for defendant, *non obstante veredicto*, and the third for a new trial, all predicated upon a verdict found in favour of the plaintiff upon his action against the

defendants for the recovery of \$4,000 on an open Policy of Insurance effected with the defendants upon portions of the steamer Malakoff. The motions are severally based upon special grounds detailed in them respectively, and will be adverted to particularly in the course of my observations. The contract of insurance between the parties is in the following terms and conditions contained in the defendants' policy : The defendants agreed to insure the plaintiff " for \$4,000, namely, \$2,400 on the hull and " cabins, \$1,200 on the engines and boilers, and \$400 on " the tackle and furniture of the steamboat Malakoff, now " lying in Tait's dock, Montreal, and intended to navigate " the St. Lawrence and Lakes from Hamilton to Quebec, " principally as a freight-boat, and to be laid up for the " winter in a place approved by this Company, who will " not be liable for explosions either by steam or gun- " powder. The company agree to make good to the in- " sured any loss or damage, not exceeding in amount the " sum insured, as shall happen by fire to the property as " above specified, from the 30th. of July, 1858, to the 30th. " of July, 1859, the said loss or damage to be estimated " according to the true and actual cash value of the pro- " perty at the time the same shall happen." The other sti-
 pulations were those generally contained in policies : name-
 ly, the exemption of the defendants from liability for loss
 occasioned by civil commotion, &c. : the avoidance of the
 policy for want of notice to the defendants and of indorse-
 ment on their policy of any other insurance effected by the
 insured on the same subjects ; in case of other insurances,
 the defendants' liability only for such sum as their insur-
 ance should bear to the whole amount insured on the said
 property ; and the acceptance of the policy subject to the
 printed conditions annexed thereto. It is proper to state
 that two other insurances were also effected by the plain-
 tiff, the first with the Equitable Office for \$2,400 on the
 hull and cabins, and \$1,600 on the engines and boilers, to-
 gether \$4,000, of the said steamboat Malakoff, and the

other with the Home Office for £1,000, to wit—\$2,400 on the hull and cabins, \$1,200 on the engines and boilers, and \$400 on the tackle and furniture of the said steamboat, making the total insurance £3,000, distributed as follows—£1,800 on the hull and cabins, £1,000 on the engines and boilers, and £200 on the tackle and furniture of the *Malakoff*. Of these the defendants had $\frac{1}{3}$ of the first, $\frac{2}{3}$ of the second, and $\frac{1}{3}$ of the third. The insurance with the *Equitable* is noted in the defendants' policy, and it is admitted that they had notice of that effected with the Home Office. It only remains to add that all these policies were open policies, without special valuation of the subjects insured by them.

The verdict was found upon special issues; articulations of facts, as follows:—1o. The defendants' execution of the policy; 2o. The destruction by fire of *nearly all* the subjects insured, except the bottom of the vessel and the remains of the engines and boilers; 3o. The plaintiff's ownership and his loss of £3,000; 4o. Namely, £1,800 on hull and cabins, £900 on engines and boilers, and £300 on furniture and tackle, with estimate of the remains worth as old iron, £300; 5o. Plaintiff's compliance with terms of the policy; 6o. The fitness and proper condition, or nearly so, of the *Malakoff* to navigate at the date of the policy, but that she had not navigated; 7o. That she was in running order at that date; 8o. That there was no greater risk in the Dock than if navigating; 9o. That she was put in order and required no further outlay; 10o. The defendants' knowledge of other insurance effected; 12o. Absence of concealment by plaintiff from defendants of the sameness of the hull of the *Malakoff* with that of old steamer *North America*, and the immateriality of that fact; and 13o. The finding for plaintiff of the sum demanded, £1,000, less £100 for $\frac{1}{3}$ share of the value of the remains. The 11th. finding is peculiar; the special issue inquires: "Did the plaintiff declare or represent to the defendants that the *Malakoff* would and should navigate, as aforesaid,

and be laid up for the winter in a place to be approved by the defendants, and was the said representation material, and was it compiled with? " The finding is, " No, he conformed to the conditions of the policy."

The contract and findings having been stated, the motions under discussion will be examined ; 1st. that in arrest of judgment is grounded upon the irregularity and inconsistency of the findings generally, and the failure of the jury to answer several of the articulations of fact submitted, and specially the 3rd and 4th., and the consequent impossibility to make up a judgment in plaintiff's favour. In my view of the case the 11th. articulation was not matter for the jury at all, being part of the contract itself, and forming part of the policy. The subject matter could not be affected by evidence of fact upon which the jury could legally pass ; but, as it was submitted to them, they should have given a sensible and applicable finding ; but as it stands the finding is no answer to the special issue. The defendants' general objection to the other findings, and particularly to those to the 3rd and 4th. special issues, cannot be sustained ; and, inasmuch as the 11th. as above, should not have been submitted, and the other findings are not apparently objectionable, the motion in arrest of judgment upon the grounds stated will be rejected. The second motion to enter up judgment for the defendants, *non obstante*, and the third for a new trial, will be considered together ; and, to get rid of a little written superabundance, the grounds which require least remark will be taken up first, and these are among the number set out in the third motion that for a new trial, which object to the rulings of the judge at the trial, in his alleged admission of illegal and rejection of legal testimony, misdirections in law, and erroneous instructions upon the evidence and points submitted. Now, of these, the 5th. and 6th. objections are untenable ; they refer to the rulings as to the proof of ownership in the plaintiff by the customs certificate and other proof adduced. But these do show both

title and possession in him ; his interest in the subjects insured is satisfied by the proof adduced, and that proof is uncontradicted. The plaintiff appears, therefore, as the registered owner of the *Malakoff* under the public document, and as in possession of her at the time the insurance was effected, as well as at the time of the accident. 1st. Taylor on Evidence, p. 126, says, that " in an action on " a policy of insurance of a ship and her cargo, the " plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, " unless rendered necessary by the adduction of contrary " evidence." The 10th. objection, of concealment and its materiality, is likewise untenable. Whether the hull of the *Malakoff* was or was not that of the *North America* was unimportant in an insurance against fire : it might have been otherwise in a purely marine risk, inasmuch as in this latter case the unseaworthiness or incapacity to perform the voyage would have given operation to the implied obligation upon the assured, of not concealing something important within his own knowledge, and any loss or damage would, therefore, have fallen upon the insured himself. The fact in evidence, however, in this respect is satisfactory, inasmuch as the old hull had been almost altogether renewed at the time of the insurance, when indeed the *Malakoff* had become a strong serviceable steamer. Moreover, this implied obligation relieves the insured from volunteering such spontaneous information—(1) however material it might be under other circumstances, although it is quite true that the insured would have been held to disclose all he knew had the information been particularly demanded of him by the insurers. So far from this being the case the latter waived the inquiry, and forestalled the information about the *Malakoff* by reference to documents in possession of defendants' agent. The jury found the fact not to be material, and their verdict in this respect will not be disturbed.

(1) 1st. Arnould, Nos. 567-8.

(1)—The 11th. objection has been already mentioned, and the very general and unimportant grounds contained in the 12th., 15th., 16th., 17th., 18th., 19th., 20th. and 21st. objections need not be dwelt upon, nor prevent an immediate reference to the really important objections contained in the 1st., 2nd., 3rd., 4th., 7th., 8th., 9th., 13th. and 14th. grounds. The four first of these have reference to the admission of illegal and the rejection of legal evidence : Nos. 1 and 2 refer to the former, Nos. 3 and 4 to the latter. As to the admission of illegal evidence : it appears that Mr. Wood, the defendants' agent, who had taken the risk, was examined by the plaintiff as his witness, and with the purpose of negating the warranty contained in the policy pleaded by the defendants, the witness was compelled to produce to the jury certain private letters and reports to his foreign principals from himself as their agent, but written after the loss had occurred. This evidence is not legal, and the requisition to produce it is not warranted by law. The general principle cited, *arguendo*, by plaintiff's Counsel, from Paley, on Agency, 322, and 1st. Taylor, sec. 539 and page 755, is undoubtedly correct, "that no agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except Counsel and attorneys." But the limitation of the general principle is also stated by them who echo the unanimous opinions of text writers and of judicial decisions, that the generality of the rule does not apply to such circumstances as the present. From the leading case of *Fairlie vs. Hastings*, decided by sir William Grant, Master of the Rolls—Paley, 269—to be found in 10 Ves., Jr., p. 123, to the present time no difference of opinion exists. He lays it down as a general proposition of law, that what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his

(1) 1st. Arnould, No. 570.

principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of his principal, or the representations or statements made may be the foundation of or the inducement to the agreement. Therefore, if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or other of those ways, he observes, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot be proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of the agent cannot be assimilated to that of the principal. A party is bound by his own admission and is not permitted to controvert it. But it is impossible to say that a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his contract or his agreement, merely because that person has been his agent. If any fact rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertions. Lord Kenyon carried this so far "in *l. Esp. Cas. 375, Masters vs. Abram* as to refuse to permit a letter by an agent "to be read to prove an agreement by the principal "holding that the agent himself must be examined. If "the agreement were contained in the letter, I should have "thought it sufficient to have proved that letter written "by the agent; but if the letter were offered as proof of "the contents of a pre-existing agreement, it was properly "rejected."—see Taylor sec. 539—The letter in this cited case was, in fact, subsequent to the contract. In the cases in 4 Taunt. 511 and 565 of *Langhorn vs. Allnott*, and *Kahl vs. Janson*, the Court of Common Pleas decided that the letters of an agent abroad to his principal, containing a nar-

native of the transactions in which he has been employed, were not admissible in evidence against the principal as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also *Reynier vs. Pearson* Ibid. 662—where the general rule is this, when it is found that one is the agent of another, whatever the agent does, or says, or writes at the making of the contract as agent, is admissible in evidence against the principal, but what this agent says or writes afterwards is not admissible. So also 4 Rowl., 294 per Rogers, J. : *Hough vs. Doyle*—so this same principle will be found in *Betham vs. Benson*, Neil Gow's R. 45. Ch.-J. Dallas there says it is not true that when an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations ; they are only evidence when they form part of the contract entered into by the agent on behalf of his principal, and in that single case they become admissible, these declarations, at a different time, have been decided not to be evidence ; numerous English and American authorities may be cited in addition ; a few will suffice :—1, B and C., 473 ; 8, Bing, 471 ; 19, Pick, 220 ; 7, Cranch, 336 ; 2, Hill, 464 ; 3, Hill, 362 ; and, lastly, Taylor on Evidence. Considering these authorities as the true exponents of the law on this point, it follows that the evidence in question was not legal and should not have been submitted to the jury ; it was not contemporaneous with the contract, not *dum fervet opus*. It may also be remarked that, as that evidence was intended to disprove the existence of a warranty written in the policy, its admission controverted another established rule of evidence, which prohibits the admissibility of parol or extrinsic evidence to contradict, vary or control written contracts. Nos 3 and 4 refer to the rejection of evidence offered. The defendants proposed to show, by the witnesses Tait and Lunn, that the insurance effected by the plaintiff with the first insurer, the Equitable Company, was accompanied by false and fraudulent misrepresentations at the

time of making the insurance with that Company, as to the condition and circumstances of the Malakoff, and as to the stipulation of her navigating. The judge *in limine* stopped the question and prevented any answer from being given. As the ruling is reported, without stating the legal ground taken for it, the authority from 3 Kent Com. p. 284, cited by plaintiff's counsel, *arguendo*, upon the motion may probably be the support for it, and is as follows:—

"This rule has not been favourably received by later judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same risks." See, also, 2, Johns, 157. The facts in the evidence in relation to this ruling are as follows: Wood, the witness above spoken of, was the agent of the *Ætna*, the defendants, and of the Home Office, and was applied to by Tate, the plaintiff's agent, to ascertain the rate of insurance. Tate intimated to Wood his desire to effect insurance upon the Malakoff for £3,000, to be distributed among three different offices for £1,000 each. Having effected insurance on the 30th. of July with the Equitable, he, on the following day, the 31st., applied to Wood to complete his original purpose; stated his previous insurance with the Equitable, and obtained from Wood insurance with the defendants for another £1,000, as above, and with the Home Office for the third £1,000. The original purpose and intention intimated to Wood, was in this way perfected, and the insurance with the Equitable was noted in the defendants' policy. In England these insurances would, of course, have been effected with the underwriters by the usual slip process, showing the signature of the Equitable as first insurer, and those of the defendants and the Home Office as second and third insurers, and there, any false or fraudulent representation made to the Equitable would avail to the defendants in resisting the claim against them. In *Barber vs. Fletcher*,

Dougl. 305, Lord Mansfield said, "it had been determined in divers cases that a representation to the first underwriter extends to all others." (1) So also Phillips commenting upon this rule, at No. 554, says:—"The principle on which this rule rests is, that in offering to a party a policy subscribed by another, the insured implies a proposal that the party to whom it is offered shall enter into the same contract which that other has entered into whose name is already upon it, unless such presumption is rebutted by what passes between the parties to the subsequent signature; and the contract will not be the same if there are certain conditions between the parties to the prior subscription which do not form a part of the contract, between those to the subsequent one. The rule is usually stated, generally, that a representation to the first underwriter is such to the others, and the meaning evidently is, that the subsequent subscribers may avail themselves of the rule in defence against a claim on the policy, and this is the result of the jurisprudence on this matter." The exigencies and necessities of trade in the extensive and busy marts of England, and the number and variety of insurance transactions that must be effected within short periods of time, have established the system of slip certificates, by which each subscriber in effect becomes an individual insurer, though on the same policy, and the usages of trade, then come in and give effect to the separation; hence it becomes necessary to recognize the influence of "such a rule, which is grounded upon the reasonable presumption that the subsequent underwriters subscribe the policy from the confidence reposed by them in the skill and judgment of him whose name they see stand first in the policy, and from their belief that he had duly ascertained and weighed all the circumstances material to the risk." (2). It is true there are limitations to the rule, as "that it

(1) See also other cases—*Pearson vs. Watson*, Cowp. 785;—*Stakpool vs. Simon*, Park. 932;—*Marsh* 772; *Tersè vs. Parkinson*, 4 Taunt, 440 and 849;—*Forrester vs. Pigou*, 1 M. and S. 9;—3 East. 572;—2 Campb.;—544.

(2) 1 Arnould, p. 531;—10 Pick, 402;—1 Peters, S. C. 185.

"is strictly confined to those matters of intelligence relating to the subject insured, with regard to which it is reasonable to suppose that the first underwriter would require information and without which it may be presumed he would not have subscribed to the policy." The rule is also confined to the first underwriter, and to underwriters on the same policy. It has not been extended, nor is the presumption on which it rests made applicable, to underwriters on a second policy on the same interests and risks, *unless*—(1) perhaps, it could be clearly shown that the second policy was fraudulently obtained by the exhibition of the first. (2) This latter remark shows that the rule is not altogether absolute against the admission of evidence to sustain fair dealing between the parties and rests authoritatively upon the broad legal principle that fraud annuls contracts. (3) The rule, with its restrictions and limitations by English decisions, is adopted as unquestionable, and Mr. Duer, with his usual perspicacity and learning, observes :—"In the United States, although from the disuse, almost total, of private underwriters, the application of the rule is now of rare occurrence, its validity has been often recognized ; and, however strongly we may be disposed to question the sufficiency of the reasons on which it was introduced, it stands on too firm a basis of precedent and authority to be now shaken. I confess my own adherence to the rule, on the *ground of reason as well as of authority*. I regard the presumption on which it is founded as reasonable, sound and practical. It springs from an acute knowledge of men, and of the usual mode in which business is conducted, and, as will appear hereafter, it is the very presumption on which other decisions, of which the propriety and wisdom have never been doubted, are solely placed and can *alone* be vindicated." Now, this is made to rest upon presumptions only : how

(1) 1 Arnould, p. 537.

(2) Duer, 68-9 :—Tibbald vs. Hall, 2 Dow, p. c. 262.

(3) 2 Duer, p. 673.

can such presumptions be reasonably refused their operation in this case, under our legal system? The aggregate insurance, whereof that of the defendants was a part, was in effect one insurance, as originally contemplated and designed by the plaintiff; the influence of the insurance effected with the Equitable Company, as the first insurer, must have been felt by the defendants, and the benefit of the plaintiff's false and fraudulent misrepresentations to that first insurer, may not in reason be refused to the defendants under the circumstances of the case. It may be that the first policy may have been exhibited to the defendants, or other facts adduced, showing that or other implications against the plaintiff; at all events false representation and fraud have been pleaded to this action, and the preventing of the introduction, *in limine*, of testimony tending to support these allegations and the rejection of the questions proposed to the witnesses Tate and Lunn, appear to have been at least premature and not consonant with law, the more so as our legal system is more enlarged than that from which we derive our commercial law of evidence, because it partakes more of the equity than the common law principles in practice in England. A casual remark upon the 9th. objection, that all material representations had been made by the plaintiff to the insurer will suffice. It is quite true that all such matters are within the sole province of the jury and not for the judge to express his judicial opinions upon them, and thereby in effect to substitute his opinion for their findings. It is undeniable that the judge cannot pass either upon the existence or extent of misrepresentations put in issue as matters of fact. The same observations apply to the 11th. objection as to the fact of the plaintiff's concealment in relation to the hull of the *Malakoff*. It is not, however, meant to be asserted that judges are precluded from the expression of their own opinions to juries upon facts submitted; but even then the latter are independent of such opinions, and themselves weigh the effect and importance of the evidence adduced.

"has been well defined, a verbal or written statement
 "made by the assured to the underwriter before the sub-
 "scription to the policy, as to the existence of some fact
 "or state of facts, tending to induce the underwriter more
 "readily to assume the risks, by diminishing the estimate
 "he would otherwise have formed of it." He elsewhere
 observes, "it is of some matter extrinsic to the contract,
 "and generally, if not always, relates to the present state
 "and condition of the subject insured. The term in in-
 "surance, it has been considered, as in the nature of a
 "collateral contract either by writing, not inserted in the
 "policy, or by parol, and is a communication of facts and
 "circumstances relative to the insurance made to the un-
 "derwriters with the view to enable them to estimate the
 "risk and calculate the premiums to be paid." "It is as-
 "serted that it is said to be material when it communi-
 "cates any fact or circumstance which may be reasonably
 "supposed to influence the judgment of the insurer in un-
 "dertaking the risk or calculating the premium, and what-
 "ever may be the form of the expression used by the in-
 "sured or his agent in making a representation of it, have
 "the effect of imposing upon or misleading the under-
 "writer, it will be material and fatal to the contract. There
 "is a material difference between a representation and a
 "Warranty; the former being a part of the preliminary pro-
 "ceedings which propose the contract, and only a matter
 "of collateral information on the subject of the insurance,
 "and makes no part of the policy; the warranty is a part
 "of the written contract, as it has been completed, and
 "must appear on the face of it. The former may be sub-
 "stantially correct, but renders the contract void on the
 "ground of fraud; the latter must be strictly and literally
 "complied with, and non-compliance with it is an express
 "breach. Fraud is an element which vitiates every con-
 "tract, and a want of truth in a representation is fatal
 "or not to the insurance, as it happens to be material or
 "immaterial to the risk undertaken; but when a thing is

(1) 1 Arnould, 439 :—Ellis, p. 30, ch. 4

"warranted to be of a particular character or description,
 "it must be exactly such as it is represented to be, other-
 "wise the policy is void and there is no contract. This
 "may be considered as a first principle in the law of insur-
 "rance." These representations have been classed as posi-
 tive representations and as statements of belief, expect-
 ation or opinion; the latter not representations of what
 is stated to be intended or expected or believed as a
 matter of fact to be made good by the assured, and will
 not affect the contract, though the fact prove otherwise, if
 the statement is made honestly and not fraudulently with
 intent to deceive the underwriter and draw him into a con-
 tract which he might decline. On the other hand, positive
 representations are affirmative and promissory, although
 the distinction is one more of form than substance, as in
 fact most positive representations, even when in terms
 affirmative, are, in effect, promissory, and whenever it is a
 positive statement of the actual or evident existence of
 some first material of the risk, it is only distinguishable in
 form from a warranty by not being on the face of it. At the
 trial the statement in the policy was assumed as a repre-
 sentation, and as such parol evidence was admitted in re-
 lation to it. That evidence clearly proved that Tate, the
 agent, did represent the Malakoff to be in Tate's Dock
 temporarily for repairs, and that when completed she would
 navigate between Hamilton and Quebec, principally as a
 freight boat, affirming the written statement on the policy.
 In spite of written and parol testimony the jury find that
 plaintiff made no such declaration or representation; the
 finding is manifestly contrary to clear evidence adduced by
 parol and is singularly contradictory of the written evi-
 dence of the statement afforded by the contract, thereby in
 opposition to a rule not of law alone, but of common sense,
 that what is contained in the policy or other instrument,
 or written upon it, purporting to belong to it, at the time
 of signing, is part of the contract and is adopted by the
 signature. Both parol and written evidence concur with

the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement the plaintiff's intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on plaintiff's part that she should be kept in the dock during the entire insurance year; and the jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, inasmuch as Mr. Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above adverted to, and the irregular and incorrect findings of the jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, that for entering up judgment for the defendants, *non obstante veredicto*, urge its importance upon the Court, because the final determination and judgment of the Court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c., and the plaintiff's non-compliance and breach with them, the Malakoff having, in fact, never left the Dock from the time of effecting the insurance in question. The judicial ruling and instruction

declared the statement to be merely permissive. Bearing in mind the express written statement in the policy, it must be observed that the person who sought and obtained the insurance was himself the proprietor in possession of the Malakoff at the time of the insurance, and must himself have known what was to be done with the boat during the season of navigation ; that being in dock for repairs, she was there to fit her for the only purpose for which she was originally built, that of navigating ; that having possession of the Malakoff, he was not only open to an offer, but actually bargained for the hiring of her for navigation purposes without reference to the defendants. Moreover, why was the intention to navigate so particularly stated, specifying the line of voyage and business travel that she was to follow ; the manner of the business to be done principally as a freight boat ; the stipulation that after her navigating done, she should be laid up in some place to be approved by the defendants ; finally, that defendants should not be liable for explosions by steam, her usual mode of propulsion, or by gunpowder, which might possibly form part of her freight. Permission to navigate does not seem to form any ingredient of these stipulations ; on the contrary, taking the contract in the fair and obvious import of words and equivalent to an express statement of all the inferences naturally and necessarily arising from it, a positive promissory representation, and, in fact, a warranty, becomes plainly manifest, which it is proved had not been complied with, and the contract has, therefore, been rendered inoperative. It must be remembered that the statement is not a mere verbal representation extrinsic and collateral to the contract, a mere verbal explanation previous to the contract, but, on the contrary, that it is written into and forms part of the contract itself, and that as a Court of law will only construe not reform a policy, the construction adverted to above in the discussion of the question of representation gives to the written statement the significant character of a warranty. Now Phillips on Insurance, No. 544, says : " it is law

"that promissory representations of material facts made
 "and referred to in the policy usually have the effect of
 "express warranties and come under that head." Arnould
 p. 490, says: "that the same statement indeed, whilst
 "when made verbally or in writing *distinct from the*
 "*policy* by the broker to the insurer is construed as a posi-
 "tive representaton and would if written in the face of
 "the policy in almost all cases amount to warranty, the
 "insertion in the policy causing it to be so construed;"
 and Ellis p. 39, says: "it is the practice of most offices
 "to insert the statement or representations made at the
 "time of effecting the insurance on the body of the policy.
 "By this means they become a warranty and prevent
 "questions from arising on the subject of the materiality
 "or immateriality of the statements." In this case the
 statement being written on the policy, it is for the Court
 to decide upon its legal bearing as a warranty and condi-
 tion, and upon the general effect of its nonfulfilment upon
 the rights and remedies of the party in fault. The pro-
 vinces of court and jury are plainly distinct, here the
 Court decides upon the sense and construction of the
 common words and phrases of the language where no pec-
 uliar meaning is proved. Arnould, p. 142, says: "a
 "warranty in a policy of insurance in whatever form
 "created is a condition or contingency, and unless per-
 "formed there is no contract. It is styled a condition pre-
 "cedent which means that it is perfectly immaterial for
 "what purpose the warranty is introduced, and that no
 "contract exists unless the warranty be literally complied
 "with." Any direct or even incidental allegation of a
 fact relating to a risk has been held to constitute a war-
 ranty. "It is simply sufficient and ought to be sufficient,"
 observed Lord St. Leonards, "to avoid the policy, that
 "only one thing warranted is not true." In this case the
 stipulation undertakes for the performance of a future act,
 —the navigating of the "Malakoff"—and is therefore
 classed among promissory warranties. The contract de-

depends on the event taking place literally, and Phillips, at p. 762, says: "it is held that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into. The assured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement which is the subject of the warranty be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction put upon warranties, in this particular, has perhaps arisen in part from the maxims of the Common Law, that conditions are to be severely construed in regard to the party imposing them upon himself." And Ellis, p. 29, concludes the matter thus—"A breach of warranty will avoid the contract. The doctrine of warranties has been a more frequent subject of discussion in cases of marine policies; but, so far as it is applicable to the subject, that doctrine is of equal authority in cases of life and fire insurance. A warranty is a stipulation or agreement on the part of the insured in the nature of a condition precedent, and as applicable to fire policies, is usually of an affirmative nature, as that the property insured is of the nature described in the policy. A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but, being once inserted in the policy, it becomes a binding contract on the insured; and, unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy. The meaning of a warranty is to preclude all questions whether it has been substantially complied with or not; if it be affirmative it must be literally true; if promissory it must be strictly performed. The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformations, mistakes of an agent, or any

"other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity. The only question is whether the thing warranted has taken place or not, or be true or not ; if not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty." Considering the statement in the policy to be a warranty, the Court is constrained to go beyond according the motion for a new trial in this cause, and to adjudge finally upon the motion *non obstante*, and order the judgment to be entered upon the record for the defendants, notwithstanding the verdict in favour of the plaintiff, with costs against the plaintiff.

MACKAY and AUSTIN, for plaintiff.

ROSE and RITCHIE, for defendants.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
APPEAL SIDE.

Before :—SIR LOUIS H. LA FONTAINE, Bart. Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

DICKEY, *et al.*, *Appellants*,
and
TERRIault, *Respondent*.

Held :—That an advancee under the act to encourage ship-building, 19 Vic. cap. 50, to whom the register of the vessel has been granted, is not, therefore, necessarily to be deemed the owner of such vessel, so as to be liable for the wages of the seamen engaged in navigating it, or of the mechanics employed in completing or repairing it.

Jugé :—Qu'un fournisseur en vertu de l'acte pour encourager la construction des navires, 19^{me} Vic. chap. 50, au quel le registre du navire a été accordé, n'est pas, par cela, nécessairement considéré comme le propriétaire de tel navire, de manière à être responsable des gages des matelots naviguant le dit vaisseau, ou des artisans engagés à le compléter ou à le réparer.

Judgment rendered the 17th. December, 1860.

During the spring and summer of 1859, one Ignace Couture built a small steamboat called the "Canada," for the use of which he purchased an engine from the appellants for £450. For the payment of this it was agreed

that security should be given upon the steamer in the manner provided by the "Act to encourage ship-building within this Province." 19 Vict. cap. 50; and a notarial deed, bearing date the 12th. of March, 1859, was accordingly entered into by the parties. The deed, after setting forth the sale of the steamer, contained the following stipulations :—" The price of the said engine, a sum " of £450, is to be considered in the nature of advances by " the said Matthew Dickey and James McDougall unto the " said Ignace Couture, to enable him to fit out and complete " the said steamer, and upon the express condition that the " said sum should and would be secured, and the payment thereof guaranteed by a mortgage upon the said " vessel, to rank first and be a privileged claim thereon; " now therefore, these presents witness, that, in order to " secure unto the said Matthew Dickey and James McDougall the payment of the aforesaid sum of money, the " said Ignace Couture did and doth hereby mortgage and " hypothecate unto the said Matthew Dickey and James McDougall, under the provisions of the act passed in " the nineteenth year of the reign of Queen Victoria, cap. " 50, intituled : ' An Act to encourage ship-building in " the Province,' a certain steamer or vessel now in course " of construction by him, as aforesaid, on his property at " Notre-Dame de la Victoire, known as Couture's wharf" (here follows a description of Couture's property.) " and " the said parties hereto do further consent and agree, that " the said vessel shall be and remain the property of the " said Matthew Dickey and James McDougall, and shall " be vested in them to all intents and purposes so that " they shall have full power to sell and give a clear title " to the said vessel."

The appellants obtained the register in their own name on the 18th. May, 1859; about the end of the same month, or the beginning of June, the steamer was launched, but she was employed as a tow-boat on the St. Lawrence, until the month of October, when the appellants took her into their own possession.

From the time the vessel was commenced until the appellants took her into their possession, she was in the actual possession and under the exclusive control and management of Couture. He employed all the men who were engaged in building her, and furnished all the materials necessary for that purpose; and whilst she was in use as a tow-boat, she was not only under the control and management of Couture, but run for his exclusive profit.

The respondent was one of the men employed by Couture, and he was engaged by him in the month of April, at £11 per month. From April until the latter part of August he was employed in putting the engine into the steamer, and whilst the vessel was in use he acted on board as engineer.

The judgment of the Court below held the appellants liable for the amount claimed by the respondent, the reasons assigned being: "that the plaintiff was a mariner on board of the steamer "Canada" from the 4th. day of April, 1859, to the 17th. day of October, 1859, at the rate of £11 per month, and that the defendants are proprietors of the said steamboat, and liable for the payment of the said wages."

MEREDITH, Justice.—We have first to consider what are the rights which accrue, and the liabilities which attach, to a person taking a transfer of a ship in progress of construction, as security for advances, under the provisions of our provincial statute. By the first section of the statute it is enacted that: "So soon as the keel of a vessel shall be laid within this province, the owner thereof, may mortgage, hypothecate and grant a privilege or lien on the said vessel to any person or persons contracting to advance money or goods for the completion thereof, and such mortgage, hypothecation and privilege shall apply and attach not only on and to that portion constructed at the time of the granting of the same, but also to and on the said vessel during her construction and afterwards."

The second section is as follows :

" It shall also be lawful for the said contracting parties
 " to agree that such vessel whose keel shall be so laid as
 " aforesaid, shall be the property of such party or parties
 " advancing thereon as aforesaid, so that such advancer
 " may obtain the register of the vessel, and sell the same
 " and grant a good and clear title therefor ; and such
 " agreement shall *ipso facto* transfer and vest, *for the pur-*
 " *poses aforesaid*, and *for the security of the said advances*,
 " not only the property of such portion of the vessel as
 " shall be then constructed, but of the said vessel up to and
 " after completion." And the third section declares : " It
 " shall be lawful for the first advancer in like manner to
 " mortgage, hypothecate and grant a privilege or lien, and
 " to grant delivery as aforesaid, to any subsequent advancer
 " and so by one advancer to another."

The position of a person making advances under this act is not perhaps as clearly defined as that of a mortgagee, under the provincial act 8th. Vic., cap. 5, or under the laws of the Imperial parliament for the registering of British vessels ; but still I think the provisions of our statute under consideration are sufficiently plain.

The law does not say that the person making advances and obtaining the register of the ship shall thereby obtain an absolute transfer of such ship. Such a provision would obviously be unreasonable ; for instance, in the present case, the appellants who obtained the register merely advanced the price of the engine, without advancing a shilling towards the building of the hull of the vessel : what the law does say, is, that the agreement shall transfer and vest the property of the vessel, "*for the purposes aforesaid*," that is to say for the purposes of the mortgage and hypothecation, "*and for the security of the advances*."—And it may be observed that the Legislature throughout the statute speaks of the person giving the mortgage and hypothecation, even after the transfer, as the

owner—and the person making the advances, whether spoken of before or after the transfer, is called the **advancer**.

The object of the statute seems to have been to permit security being given on a vessel before registration, as nearly as possible, in the same way as previously to the passing of the law, security could have been given on a vessel after registration ; and the expressly declared intention of the legislature is, to enable a person, making advances on a ship in the progress of construction, to obtain security on the vessel for his own claim ; whereas the effect of taking a transfer of a ship under the provincial statute, according to the pretensions of the respondent, would be, not so much to secure the claim of the advancer, as to make him liable for the claims of other creditors.

I am therefore of opinion that a person taking security, under our provincial statute, upon a vessel in progress of construction, is not therefore, necessarily, to be deemed the owner of such vessel so as to be liable for the wages of the persons employed in the building of the ship or for other claims of the same kind.

If I am right in this view, then, in this case, as in most cases of the kind, we have to consider, to whom was the credit given ? and it appears to me sufficiently plain that in this case the credit was given to Couture, and not to the appellants.

During the whole of the time for which the respondent claims wages, the steamer " Canada " was in the possession, and under the control of Couture, by whom, and for whose benefit, that steamer was built and run. The respondent was employed by Couture, at £11 per month in the month of April, and from that time until the month of August he was employed in putting the engine into the steamer, and while the steamer was in use he acted as the engineer on board.

I make a distinction between the services of the respondent in building and completing the vessel, and those rendered by him in navigating it ; as regards the latter he is entitled to be looked upon as a mariner, but he cannot, I think, be so considered with respect to the former ; and, in the light in which this case is now being viewed, this distinction may perhaps be of importance, because in some American cases the owners of a vessel, under the control, and in the possession of another person, have been held liable for the wages of the seamen, although it seems they would not have been held liable in the same cases for repairs, or for goods supplied to the ship.

As showing that the respondent ought to be considered a mariner with respect to the whole of his wages, reference was made to the following passage in *Flanders on Shipping* : " It is not only for wages earned in the course of a voyage that seamen may sue in the admiralty, but also for wages earned in rigging and fitting out a ship for a voyage on which they have engaged to proceed, but which the owners abandon. Thus in the case of *Parry vs. the Peggy*, the promovents had agreed for monthly wages for a voyage to the West Indies. They worked on board the ship for some days in the harbor of Dublin ; afterwards, Mr. Maguire, the owner of the ship, having changed his mind, determined to alter the voyage and to postpone the sailing of the ship ; whereupon the seamen were dismissed without their wages, who now libelled against the ship. The surrogate of the admiralty decreed for the seamen, on the reason of the thing, and the authority of *Wells vs. Osmond*."

It appears to me only reasonable that seamen engaged in rigging and fitting out a ship for a voyage on which they had engaged to proceed should be allowed to sue for their wages in the Admiralty Court.

In *Wells vs. Osmond*, (1) Chief Justice Holt said " the

(1) 2. Lord Raymond, 1044.

reason of the admiralty jurisdiction is, because they are mariners, and they are equally entitled to their wages as if they had gone the voyage."

But in the present case the respondent is not proved to be, or even alleged to be a seaman, and it appears to me that he cannot be regarded as such for the time he was employed in putting the engine into the steamer in question, the vessel being at the time unfinished.

If we hold that an engineer working for some months or weeks in putting an engine into an unfinished steamer is on that account to be deemed a mariner, then I do not see how we could avoid saying that all the mechanics engaged in the building of a ship are mariners; a conclusion which could not be justified, either by the reason of thing, or by the authorities cited.

Here I think it right to refer to the evidence because the learned judge who dissented from the judgment about to be rendered in this cause, does so, as I understand, on the ground that the defendants were in the possession and enjoyment of the steamer "Canada," at the time the plaintiff earned his wages.

I now revert to the consideration of the question—to whom was the credit given?

The respondent himself in his answers to the interrogatories *sur faits et articles* admits that he was engaged by Couture, and his own witnesses clearly prove that it was for Couture he worked.

François X. Renaud, master carpenter, the first witness examined by the respondent, says, in his cross examination: "C'est moi qui ai construit ce bateau-à-vapeur. Je l'ai commencé pour M. Ignace Couture, et je l'ai aussi fini pour lui."

Ignace G. Gagnon, inspector of steamboats, the second witness examined by the respondent, says: "Le steam-

"boat a été bâti chez Couture, et c'est lui qui a navigué le dit steamboat.".... Le chantier était au nom de ce dernier." Elisée Rousseau, engineer, third witness examined by the respondent, says : " Pendant le temps que le steamboat marchait c'était Couture qui l'a fait marcher, et pas les défendeurs.... Le demandeur m'a dit qu'il était engagé à raison de onze louis par mois par le dit Ignace Couture." Jean Poiré, also a witness for the respondent says : " J'étais présent quand le demandeur a été engagé pour travailler aux mouvements de ce steamboat, et c'est le dit Couture qui l'a engagé. La conversation qui a eu lieu entre eux était, qu'il était engagé pour poser les mouvements, et pour le mener pour la saison à raison de £11 par mois. Couture n'a pas dit qu'il était agent pour quelqu'autre personne, ni qu'il payerait les gages, et rien n'a été dit par rapport au paiement. Le demandeur était engagé pour poser les mouvements et mener le steamboat, et dans ce temps Couture passait pour être le propriétaire."

Messrs. Rhéaume, Bignell and Lachance, prove that the services of the respondent after the steamer was in use were rendered with a full knowledge on the part of the respondent that the appellants would not hold themselves liable for those services. The respondent, it is true, then declared his determination to look to the steamer, and to the appellants as the proprietors of it, for his wages ; but the respondent having been engaged by Couture, and having worked for him with full knowledge that the appellants had refused to be liable for his wages, could not create a claim for himself by making the declarations just mentioned. (1)

(1) As to the oppositions of the appellants, and the affidavits filed in support of them, as has been already observed, the appellants, under the statute, were owners of the steamer "Canada" for the purposes of that statute, and so as to secure their advances ; and therefore they had a right to claim the steamer by their oppositions in the way they claimed it ; and although it would, I think, have been better if the affidavits had stated the facts with greater particularity, there is no reason to suppose that the affidavits, as made, led the plaintiff into error, or influenced his conduct in any way. And, even if the affidavits were untrue, which they are not, the consequence would be, not to give the plaintiff a right of action which he otherwise would not have had, but to render the parties who made the affidavits liable to punishment.

Such are the facts of the case, and the law relating to them is very clearly laid down in Abbott on Shipping, from page 33 to 36. At page 33, reference is made to Jennings vs. Griffiths, in which Lord Tenterden speaking of the registry acts observed :—" Soon after the passing of these " acts, the leaning of the Courts of law in their construction was to say that the *registered owners of ships* should " at all events be liable for repairs. But the subject having " become more accurately understood, a better and more " correct principle now prevails, and the recent cases have " decided that the true question in matters of this description is, *upon whose credit was the work done ?* " And at the same page the author adds—" upon the same principle has been determined the cases in which the question has arisen whether the hirers of a vessel for a specified time, or adventure, or the absolute owners are " liable for repairs done or stores supplied to her. Here " again the question has been : On whose credit was the " work done, or the goods supplied ; by whose servant was " the order for them given ? " In the case of Reeve vs. Davis referred to at page 34, Lord Denman said : " The " question is who were the contracting parties ? The mere " circumstance of ownership may be sufficient to create a " liability where the vessel has been left under the control " of a party who has given orders ; if no intervening " ownership has been created. But if a ship be let out to " hire, I do not see how the owners are liable for work done " upon it by order of the party hiring, more than the landlord who lets a house."

At page 40, the same author sums up the law as to the question under consideration as follows : " It thus " appears that the registered owner, the mortgagee, the " charterer of a ship, are none of them, as such, necessarily " liable for repairs done to her, or for goods supplied. Orders are received from the person, usually the master, in " apparent charge and custody of the vessel, against whom, " personally, unless at the time of dealing he disclaimed

“ all personal responsibility, the tradesman has a right of
 “ action. But if that be unsatisfactory, as it frequently
 “ must be, he should before he seeks his remedy against
 “ others, enquire for whose use and benefit his labour was
 “ given, or his goods supplied ; who were the immediate
 “ owners absolute or temporary at the time the orders were
 “ received, under whose authority the captain acted, whose
 “ servant or agent was he at the time he gave them ; and
 “ he may save himself much trouble, if instead of relying
 “ blindly on “ the credit of the ship ” or “ the owners of
 “ the ship ” he be advised to make all these enquiries be-
 “ fore he sets to work, or parts with the possession of
 “ his goods.”

Curtis in his work on the rights and duties of merchant seamen, states the law on this subject as follows : “ From
 “ these and the analogous cases of repairs and supplies, it
 “ would seem that the *naked legal title*, or the *possession*,
 “ *being in the mortgagee*, is not sufficient to charge him
 “ with the *wages of mariners*, unless he receives the freight,
 “ or, what is the same thing, unless the voyage is per-
 “ formed for his benefit. But if the legal title, or the posses-
 “ sion, be accompanied with an interest in the voyage for
 “ his own benefit, he may be charged with the wages of
 “ the mariners.

Flanders closes the chapter in his work on shipping
 “ which treats of the seaman’s remedy for wages by
 “ observing that “ when the hirer of a vessel has the pos-
 “ session transferred to him, and he appoints the master
 “ and crew, and sails her at his own expense, and has
 “ the entire control, he is considered as succeeding to all
 “ the rights and liabilities of the owners. He is substi-
 “ tuted in their place and is liable for the wages of the
 “ seamen.” As tending to limit this rule, the author refers
 to the case of *Skolfield vs. Potter* (which is also referred
 to in the American Edition of Abbott) in which judge
 Ware held : “ That when a vessel is let to the master to be

“employed by him *and he to pay to the owners a certain portion of her earnings*, the owners will be liable to the seamen for their wages, though by the agreement the master is to have the entire control of the vessel, to victual and man her and furnish supplies at his own expense ; unless at the time of shipping, this contract is made known to them and they are informed that they are to look to the master as the only owner.”

The present case differs from *Skolfield vs. Potter* in two important particulars.—In the first place, in the case before us, the appellants did not receive any portion of the earnings of the steamer *Canada* ; whereas in *Skolfield vs. Potter*, the vessel was let on shares, (*Flanders No. 361*)—and in the second place, the respondent in this cause was in effect notified that the appellants would not hold themselves liable for his wages ; whereas no notice of the kind had been given in *Skolfield vs. Potter*.

Curtis in his work at page 332 refers to a case decided by the Supreme Court of New-York, which seems very analogous to the present one.

“In that case (1) the master of a vessel sued for his own wages and those of his apprentice. It appeared that the defendant held a bill of sale of the ship, absolute in its terms, was named as owner in the register, and wrote the usual letter of instructions to the master, when about to sail on the voyage. The master was hired for the voyage by the vendors of the ship.

“For the defendant, it was proved that the bill of sale, though absolute on its face, was given as collateral security, by way of mortgage ; that he merely lent his name to cover the voyage, but was not interested in it, and did not receive the freight, *and that the plaintiff had full knowledge of these facts*. The Court held, that whether the defendant were to be considered as an ab-

(1) *Champlain and Butler*, 18 Johns. Rep. 169.

“solite purchaser, or as a mortgagee in possession, would be immaterial, provided there was an actual contract of hiring between him and the plaintiff; and that, in either case, the relation of master and owner would exist, so far as to support the claim for wages, if the voyage was performed for the use of the defendant. But as the defendant was not interested in the voyage, and the master knew this, he must look to the actual employers with whom he made his contract.”

Upon the whole it appears to me that the appellants cannot be held liable for the wages of the respondent, merely in consequence of their having, under the provisions of the provincial statute, taken as security for their advances a transfer of the vessel in the construction and navigation of which the respondent earned his wages,—and apart from this, there is nothing in the record upon which, according to my view, the appellants can be held liable.

As regards the respondent's wages earned before the vessel was finished, he is in the same position as a creditor claiming for repairs or supplies would be. He was employed by Couture, worked for him, and must look to him for his wages. And as regards the services of the respondent, earned after the vessel was finished and in use, those services also were rendered for the benefit of Couture, and in pursuance of an agreement with him—and as in addition to this, the appellants, to the knowledge of the respondent, had no interest in the earnings of the steamer during the time the last mentioned services were rendered, and as, moreover those services were so rendered, after notice that the appellants would not hold themselves liable for the wages of the respondent, I am of opinion that the respondent, although the case is one of great hardship for him, cannot claim his wages from the appellants personally.

MONDELET, Justice :—The respondent's demand rests upon a *quantum meruit* allegation, and also upon an alleged

agreement,—a very irregular form of action, or rather a doubtful action, which might have been excepted to. However, such as it is, either upon the *quantum meruit*, or the agreement, it cannot stand. The respondent is no mariner, and cannot, from an engineer or a mechanic, be transformed and metamorphosed into one; therefore he cannot in law claim the lien or *hypothèque* he pretends to have on the steamboat. As to the agreement with the appellants, he has failed to prove it. He was engaged by Couture, but there is no evidence that Couture was acting for the appellants, one of whom, Matthew Dickey, when examined on *facts et articles*, peremptorily denies ever having hired the respondent. I am of opinion the judgment of the Superior Court, based upon the impression that Terriault was a mariner on board the steamer, is wrong, and should be reversed.

DUVAL, Justice.—I concur in the observations of Mr. Justice Meredith. The respondent has a good claim, but he has not made out the appellants' liability. He alleges in his declaration that he was engaged by Couture as the agent of the appellants, but proves merely that Couture engaged him without anything being said as to Dickey and McDougall. He was a mechanic at first, and can be viewed as a mariner only while navigating the vessel. He must look for payment to the parties with whom he contracted, (1) and the evidence shews that credit was given to Couture. The builder, to whom the law gives a special privilege, is not to lose his claim in order that a mechanic may be paid. It is true that in Dickey's opposition the appellants were alleged to be owners and in possession of the steamer, but the law comes to our assistance in deciding whether they really had a full right of property in the vessel, and, under the statute, it is manifest they had not, except as security for the advances they had made; they had no other rights than those of mortgagees. With respect to the wages earned while the steamer was being

(1) 1 Bell, sec. 22 :—Smith's Mercantile Law :—Pothier, Louage, ch. 225.

navigated, the owner is not responsible for wages when he does not run the boat. If any authority were required on this head we could get it in judge Ware's decision already referred to. Those who participate in the profits must share this liability. (1) Had the respondent taken an action *in rem* in the admiralty he might have succeeded for the wages earned while navigating, but he has evidently deceived his legal adviser as to the contract being made with Couture, as the agent of the appellants, and must suffer the consequences.

AYLWIN, Justice.—I differ in opinion from the majority of the Court upon certain questions of fact and also of law. The vessel was attached, at the commencement of this suit, under a *saisie conservatoire*, at the instance of the respondent, who calls himself an engineer, and who worked on board until she was attached. The boat having been built upon credit, the difficulties usually attendant upon such a beginning were soon experienced; she was first seized by one and then by another of Couture's creditors.

In each case the seizure was opposed by the present appellants, who, in *Belanger vs. Couture*, filed an opposition, accompanied by affidavit, claiming the steamer and alleging it was registered as their's at the Custom House, and in *Sullivan vs. Couture*, by a second opposition, likewise supported by affidavit, not only stated the vessel belonged to them, but that they, the appellants, had taken possession of her. The defence which they now set up to the action brought by the respondent, instead of being special, and alleging those facts which would go to shew they were not liable for his wages, is the mere general denegation, or, as it should be called, the universal denegation. But, although I conceive the mortgagees' pretensions should have been urged in a special shape, as the respondent did not think fit to take objection, I shall not

(1) Holt on Shipping 461, 474;

do so now for him. On reference to the record I find that the vessel was registered at Quebec in the name of the present appellants. It is true the register itself has not been produced to prove this fact, but *cui bono* produce it to prove what Dickey had already sworn to, that he and McDougall were the owners and in possession. The appellants have in fact produced evidence against themselves. They have filed two papers, one a copy of a newspaper called the *Morning Chronicle*, informing the public that they would not be answerable for any debts contracted for the steamer without a written order from themselves, and the other a document wherein it is stated that, for good and valid consideration, they did charter and hire the vessel to Couture. The judge in the Court below very properly gave judgment in favor of the respondent. A new system of navigation now exists, steam does the work of thews and sinews, and the man who attends to the machinery is, to all intents and purposes, as much a sailor as he whose labor consists in hoisting a sail or pulling a rope. The respondent continued on board after the vessel was navigated; Rhéaume swears that after the launch, and before the first voyage, he went to Terriault and wanted him to give up his privilege, but that he refused to do so.

By remaining on board he preserved that privilege; it was a tacit admission that he had refused to rely on the master, and looked to her owners for payment; and I hold his being allowed so to remain as a recognition of his past services. The mariner has a three-fold recourse for his wages; he may proceed *in rem* against the ship and freight, against the ship, freight and master, or *in personam* against the owner or the master alone. Being a mariner there was nothing to prevent the respondent from attaching this vessel in the admiralty, or in that Court proceeding against the appellants as owners. The right of the mariner for his wages is superior to that of any other person; it cannot be said that he and the ordinary creditor stand upon a common basis. If there are any circum-

stances going to exonerate the owner from liability, it is for him to shew what they are ; if he wishes to free himself from the liability, he must establish that he has shifted it to the shoulders of some one else. (1) The appellants here have signally failed to shew that the vessel was chartered to Couture ; the paper supposed to be a charter-party has never been executed ; it is a piece of waste paper, and relieves the appellants of none of their responsibility. According to their own avowal the appellants were the owners of the steamer upon the face of the register and they have also sworn that they are now the owners ; yet it is said they are not to be deemed the owners so as to make them liable for a mariner's wages. I do not regard the result of adopting such a view of the case as unlikely to be attended with danger. The respondent has lost his labor, and by a construction of that kind put upon the act, parties are allowed to juggle with him and others like him, by figuring as owners or not, as they please, but at the expense of those who have given their time and services to the fitting out and navigation of the vessel. I cannot but express my regret at seeing the labourer deprived of his hire.

HOLT and IRVINE, for appellants.

LEMIEUX and REMILLARD, for respondent.

(1) *Skolfield vs. Potter*, Davis' Reports, cited in *Flanders on Shipping* :—*Beave vs. Davis*, 1 A. and M. 312.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—STUART, Juge.

N^o. 375. { BELLEAU,..... Demandeur,
 vs.
 { DEGOURDELLE,..... Défendeur.

Jugé :—Que dans une action sur une obligation, le demandeur ne peut, dans l'espèce, recouvrer que le montant réellement perçu par le défendeur, et non le montant porté à l'obligation.

Held :—That in an action upon an obligation, in the case submitted, the plaintiff can only recover the amount of money actually received by the defendant, and not the amount named in the obligation.

Jugement rendu le 4 Février, 1861.

La présente action fut instituée le premier jour de septembre, 1859, pour la somme de cent trois louis dix chelins courant. Le demandeur réclamait en premier lieu cent louis, montant d'un acte d'obligation portant hypothèque, fait et passé devant M^{re} Petitclerc, et confrère, notaires, en date du 27 août, 1857, par lequel le défendeur reconnut devoir au demandeur la susdite somme, pour valeur reçue par pareille somme prêtée au défendeur en présence des notaires ; et aussi une somme de trois louis dix chelins pour certains frais d'opposition fondée sur la dite obligation.

Le défendeur par exception perpétuelle, plaida en substance :

1^o. Que la somme de cent livres mentionnée en la dite obligation, n'avait jamais été prêtée par le demandeur au défendeur, et que le demandeur n'avait compté au défendeur que celle de soixante et trois livres courant.

2^o. Que la différence entre la somme reçue et le montant de l'obligation avait été retenue par le demandeur sous forme de *bonus*.

Le défendeur maintint que par la loi en force, lors de la passation de l'acte d'obligation, (1) le demandeur ne pouvait pas stipuler un taux d'intérêt excédant six pour cent

(1) 15 Vict. ch. 80, sec. 3.

par an, et que tous contrats stipulant un taux excédant six pour cent par an, étaient nuls, et que, partant, l'obligation du 27 août était nulle et de nul effet. Toute la preuve consiste des réponses du demandeur aux interrogatoires à lui soumis par le défendeur, et de cette preuve il résulte :—Que le demandeur n'avait reçu ni *bonus* ni escompte du défendeur pour le prêt en question en la cause. Que vers le commencement d'août, 1857, le défendeur était allé chez le demandeur, afin de faire l'emprunt d'une somme d'argent. Que le demandeur dit au défendeur qu'il n'avait pas d'argent à prêter, et référa le défendeur à certaines personnes dans l'habitude d'en prêter. Que dans le cours de la conversation il fut question de certaines personnes qui prêtaient en donnant des débentures. Il fut *expliqué au défendeur qu'il serait obligé de faire des sacrifices s'il empruntait sur cette espèce de sûreté*. Que quelques jours après, dans le même mois, le défendeur revint de nouveau chez le demandeur, et dit qu'il trouvait à échanger une débenture de cent louis pour soixante-et-quinze louis, dans un bureau, disait-il, vis-à-vis la Cour de justice, et demanda si le demandeur était disposé de lui en laisser avoir une de cent louis. Que le demandeur lui dit alors qu'il *préférerait ne pas lui en donner parceque la perte serait trop forte pour lui*. Il répondit qu'il lui fallait cet argent pour un achat qu'il avait fait, et sur lequel il était en chemin de faire un gros profit par une vente. Que le demandeur consentit alors à la demande du défendeur de lui donner une débenture de cent livres courant, payable au porteur, avec intérêt à six pour cent payable semi-annuellement. Qu'après avoir réglé les délais et les sûretés offertes, l'obligation mentionnée en cette cause fut exécutée. Que de retour au bureau du demandeur, le défendeur reçut la débenture, et se préparait à laisser le bureau lorsqu'il dit au demandeur que cela lui éviterait des troubles et lui ferait plaisir, si il lui payait sur cette débenture les trois cent piastres, qu'il disait lui être offertes comme

ci-dessus. Que le demandeur n'ayant aucune raison de soupçonner les motifs d'action du défendeur, remit au défendeur trois cent piastres. Que le défendeur de son bon gré, sans aucune demande de la part du demandeur, lui paya douze louis pour deux années d'intérêt à échoir, le défendeur alléguant que ça pouvait lui être plus facile alors que plus tard.

Le défendeur fit un *affidavit* au soutien d'une motion pour interrogatoires supplémentaires dans lequel il nia formellement qu'il avait été question de débentures entre lui et le demandeur. De plus, il déclara qu'il n'avait jamais consenti à accepter une débenture, qu'il n'avait jamais reçu une telle débenture de la part du demandeur, et qu'il n'avait conséquemment jamais remis une débenture au demandeur en considération de la somme de soixante et quinze louis courant. Il admit avoir payé ou remis au demandeur une somme de douze louis courant, qu'il prétendit être pour intérêt sur le montant de l'obligation.

Le demandeur, interrogé de nouveau, répondit que la débenture en question portait le numéro cent quatre vingt douze, et la date du onze décembre, mil huit cent cinquante cinq ; qu'il l'avait acquise dans le mois de mars, mil huit cent cinquante sept, pour la somme de quatre vingt louis courant.

De la part du demandeur il fut dit ; que le contrat tel qu'il apparaissait de la preuve faite dans la cause était parfaitement légal ; — que c'était un contrat bien connu, surtout depuis l'émission de débentures par le gouvernement pour venir en aide aux incendiés de 1845. Que la valeur de ces débentures variait d'un jour à l'autre, et qu'il eut pu se faire que si le défendeur n'eut pas disposé sitôt de la débenture qu'il avait reçue du demandeur, elle eût pu plus tard monter au paire, ou même se vendre à prime ; c'était un contrat aléatoire ; en supposant que le défendeur, après avoir gardé la débenture pendant un certain temps en eut disposé à un étranger pour une somme quel-

conque, lui eut-il été loisible de dire au demandeur dans une action pour le recouvrement du montant de son obligation :—J'ai vendu cette débenture pour £75, et vous n'avez pas droit de recouvrer de moi plus que je n'ai reçu moi-même.—Assurément non.—Une pareille prétention n'eut pu être accueillie.—Et bien, le fait qu'il avait vendu cette même débenture au demandeur ne saurait changer leur position, il importait peu au reste que le défendeur fut resté propriétaire de la débenture une heure ou un an.—Si cette débenture était restée en sa possession comme propriétaire, ou s'il pouvait en disposer comme bon lui semblait en la transportant au demandeur ou à tout autre, assurément que le demandeur avait bien le droit comme toute autre personne d'en devenir l'acquéreur.

STUART, Justice :—This action is for the recovery of a sum of \$400, amount of the defendant's obligation bearing date the 27th. August, 1857, which, upon its face, purports to be for a like sum lent by the plaintiff to the defendant. To this action the defendant pleads that the sum lent was \$252, and no more ; that the difference between that and the sum demanded was intended as a *bonus* for the loan ; that the plaintiff cannot recover more than the sum lent and six per cent interest ; and that the obligation or security sued upon was void for the difference. The issue therefore between the parties is whether the loan was such as set up by the plaintiff, or such as alleged by the defendant, but neither pretends that the contract between them was other than a loan.

The plaintiff being examined on *faits et articles* by the defendant, relates minutely the circumstances which led to the passing of the obligation sued upon ; and though the transaction might be looked upon as the sale of a turnpike trust debenture ; yet, as the parties throughout the case treat the contract as one of loan, the Court feels itself bound to deal with it as it is set up by both parties.

The plaintiff says that he gave \$300, from which the

defendant, unsolicited, paid him \$48 for two years interest to arise on \$400, thus leaving a sum of \$252, as the one the defendant took away with him. The law makes the contract, and any security for the same, void so far as relates to any excess of interest over and above the rate of six dollars for the forbearance of \$100 for a year. In Montreal the case has arisen, (1) and the Court there reduced the security to the sum received by the defendant. The Court must do likewise in the present case, and in some others before it ; and there must be judgment against the defendant for \$252, with interest from the date of the obligation.

BELLEAU et JOLICŒUR, pour le demandeur.

FOURNIER et GLEASON, pour le défendeur.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
IN APPEAL. }

Before :—SIR L. H. LAFONTAINE, Chief Justice, AYLWIN,
DUVAL, MEREDITH and MONDELET, Justices.

THE EQUITABLE FIRE INSURANCE COMPANY, .. *Appellants.*
and

QUINN, *Respondent.*

Held :—That an Insurance Company is liable to a party whose stock in trade is insured by them, for the actual market value of such stock at the time of the loss by fire ; and not for the cost price thereof, or the sum which it may have cost the party insured to manufacture such stock, notwithstanding that the assured had not insured his profits upon the subject insured.

Jugé :—Qu'un assuré a droit de recouvrer d'une compagnie d'assurance qui a assuré son fonds de commerce la valeur de tel fonds sur les marchés lors de sa destruction par le feu ; et non seulement le prix coûtant d'icelui, ou la somme que la confection des effets peut avoir coûté à l'assuré, nonobstant que les profits sur l'objet assuré n'avaient pas été assurés.

Judgment rendered on the 12th. day of March, 1861.

In this case, the respondent, plaintiff in the Court below, obtained judgment against the appellants for the sum of £200, being the amount insured by them on his stock and utensils in trade as a general turner.

(1) *Molisan vs. David*, 4. L. C. Jur. p. 302.

The principal matters of fact in the plaintiff's declaration were admitted, including the making of the policy, the amount insured thereby, the renewal thereof, and a loss by fire while the policy was in force ; but not admitting the quantity and value of the articles insured by the policy. The quantity and value were, however, established by the respondent's witnesses. By the policy, the appellants agreed to *pay or make good to the insured all such loss or damage as the said insured should suffer by fire*. The loss and damage which he had suffered, the respondent contended, was the *value* of the blocks in the market. The appellants on the contrary contended that they were only liable to the respondent for the cost of the effects, inasmuch as the respondent had not effected insurance upon the profits he expected to make upon his goods. A number of witnesses were produced by the appellants who established the cost of the articles insured at a considerably lower amount than the value proved by the respondent. The appellants, in consequence, tendered the sum of one hundred pounds with interest and costs to the party insured, who refused to accept the offer, and the present appeal was in consequence instituted.

MEREDITH, Justice.—The action in the Court below was founded upon a policy of insurance by which the plaintiff, a block-maker by trade, insured his stock in trade, consisting of blocks, for £200.—The property insured having been destroyed by fire, the present action was brought for the recovery of the insurance ; and the only question between the parties is as to the value of the blocks destroyed. The defendants contend that the plaintiff is not entitled to more than the amount which it cost the plaintiff to manufacture the blocks in question ; but this pretension cannot, I think, be maintained. The plaintiff is entitled to what the blocks were worth in the market, at the time they were burned ; and I think, according to the evidence, they were worth the amount the plaintiff had insured upon them, namely, £200 ; that being the amount of the judg-

30. Que si le demandeur avait jamais eu droit d'action contre le défendeur pour le recouvrement du montant de ses honoraires et déboursés en cette cause, tel droit d'action lui était accru depuis plus de cinq années avant l'institution de l'action, et qu'en conséquence sa réclamation était éteinte par la prescription de cinq ans.

40. Que les prétendues causes d'action mentionnées en la déclaration du demandeur n'avaient pas originé dans les cinq années antérieures à l'institution de cette action.

50. Que le défendeur depuis plus de cinq années avant l'institution de son action n'avait jamais fait aucune promesse au dit demandeur tel que mentionné en sa déclaration en la cause.

Le demandeur répliqua généralement à ces plaidoyers, et en outre produisit une réponse en droit aux quatre premiers chefs de l'exception péremptoire en droit perpétuelle du défendeur, et donna entr'autres les raisons suivantes :

10. Qu'il n'existait aucune prescription contre la demande du demandeur tel qu'invoqué et plaidé par le défendeur.

20. Qu'aucune partie du statut invoqué en l'exception du défendeur n'établissait une prescription absolue, mais seulement une présomption de paiement.

30. Que pour donner droit au défendeur de plaider prescription contre la réclamation du demandeur, il était tenu d'alléguer en son plaidoyer que le montant réclamé avait été payé, et d'offrir son serment au soutien de cette allégation.

40. Qu'en admettant que les diverses causes d'action n'étaient pas accornes au demandeur dans les cinq années avant l'institution de cette action, tel qu'allégué par le défendeur en son exception, néanmoins le dit demandeur n'était pas privé de son droit d'action contre le dit défendeur.

La cause ayant été inscrite pour audition sur la réponse en droit, et les parties, par leurs procureurs respectifs, ayant été entendues :

TASCHEREAU, Juge, lors de la reddition du jugement fit les observations suivantes :—

La question qui s'élève en cette cause est de savoir si la prescription établie par la 12^e Victoria, chap. 44, qui a rapport aux honoraires et déboursés des procureurs *ad lites* est une prescription absolue, ou une simple présomption de paiement. Pour décider cette question j'ai cru devoir référer à quelques causes dans lesquelles des décisions à peu près analogues ont été rendues, ainsi qu'à différentes autorités, et après avoir pesé toutes les considérations qui confirmaient mes premières impressions sur cette question, j'en suis venu à la conclusion que la prescription établie par le statut 12^e Victoria, chap. 44, et invoquée en cette cause, n'est pas une prescription absolue, mais simplement une présomption de paiement.

En effet, en référant à la deuxième clause du statut en question, il est facile de voir que la fin de *non-recevoir* qui y est statquée n'a d'application qu'aux shérifs et autres officiers de justice, et que par conséquent la prescription établie contre les procureurs *ad lites* devient une simple présomption de paiement ; et encore est-ce une question bien controversée que celle de savoir si l'on peut légalement offrir, aux shérifs et autres officiers de justice, un plaidoyer de prescription fondé sur ce statut, sans plaider paiement, et sans offrir le serment, quoique les termes, *fin de non-recevoir*, en soient bien formels, mais comme je suis d'opinion que les termes *fin de non-recevoir* mentionnés en cette clause du statut ne s'appliquent nullement aux honoraires et déboursés des procureurs *ad lites*, la question soulevée en cette cause, à mon avis, ne souffre aucune difficulté.

Quant aux termes, *fin de non-recevoir*, tirés du droit français, mon opinion est qu'il ne peuvent et ne doivent avoir

une plus grande étendue aujourd'hui qu'ils n'en avaient sous le régime français, là où il était traité de prescription de courte durée ; en effet, si l'on réfère à la cause de Scott et al. vs. Stuart, rapportée dans le volume premier des Décisions des Tribunaux du Bas-Canada, page 167, l'on verra que l'opinion de l'honorable M. le Juge Duval, sur le pareil sujet, est que ces termes ne comportent pas une prescription absolue, mais seulement une présomption de paiement, et il maintient de plus que l'on devait ainsi entendre la prescription établie par l'Ordonnance de 1510, déclarée, par la 12^e Victoria, chap. 44, faire partie du droit Civil du Bas-Canada.

M. Pothier, dans son Contrat de Mandat, N^o. 138, confirme mes prétentions sur la signification des termes *fin de non-recevoir*, il dit que : “ Toutes ces *fin de non-recevoir* sont fondées seulement sur une présomption de paiement : elles laissent au procureur le droit de déférer le serment décisoire à son client, s'il a payé, et à sa veuve et ses héritiers, s'ils ont connaissance que les salaires soient dûs.

Les mêmes principes sont établis par M. Pothier dans son *Traité des Obligations*, Nos. 640 et suivants.

Pour ces considérations je suis d'avis que les termes *fin de non-recevoir* mentionnés dans le statut en question ne comportent pas une prescription absolue, mais simplement une présomption de paiement, et que pour maintenir un plaidoyer fondé sur ce statut il faut y alléguer d'une manière spéciale le paiement de la créance réclamée, et faire l'offre du serment de la partie, et, *à fortiori*, pour les raisons ci-dessus, je maintiens que le plaidoyer de prescription offert par le défendeur en cette cause n'alléguant pas de paiement, et n'offrant pas le serment de la partie au soutien de cette allégation, doit être renvoyé quant aux quatre premiers chefs, et la réponse en droit (*demurrer*) du demandeur doit être maintenue.

“ La Cour, etc. :—Considérant que la prescription établie

On the previous day, the 14th January, 1859, Théberge had sublet to Marc Lapointe.

In February, 1861, Lapointe brought suit against Théberge to recover damages caused him in consequence of the house not being *close et couverte*, and Théberge instituted his action *en garantie* against the heirs Hunt.

To this action the defendants *en garantie* pleaded a general denegation.

On the day fixed for proof Théberge placed on record a copy of Hunt's lease to him, and notarial copies of protests served upon him by Lapointe, and by him upon Hunt, of the 29th. September, 1859, and 22nd. November, 1860, indicating the condition of the premises. Théberge also examined Weston Hunt, one of the defendants *en garantie*, who admitted that he was aware the house had been sublet to Lapointe, and that in consequence he had exacted and received from Théberge the additional premium of insurance which had become due on account of the premises being sublet to a tavern-keeper.

ANDREWS, Senior, for Théberge, argued that the action *en garantie* always lies whether the *trouble* was caused to the lessee or to his sub-tenant, (1) and generally against the party whose default is the cause of the action against the plaintiff *en garantie*, because in such case the defendant in chief cannot properly defend himself without putting that party in the cause, and because it is his interest to be in the cause, and a circuit of actions is avoided. (2)

If Hunt's action in chief had been to dispossess the sub-tenant because of the want of right in the principal lessor to lease the premises, the action *en garantie* would lie, as it would also if the sub-tenant had not been able to obtain possession by reason of the fault of the principal defendant.

(1) Guyot, Rep. de Jurisp., vbo. Bail, p. 43, et seq.

(2) 3 Lower-Canada Jurist. p. 226, Delvechio vs. Joseph.

That Théberge not having the right to sublet did not alter the case, because the damage still originated in the default of Hunt, and Théberge having contravened the stipulation not to sublet merely gave Hunt an action to resiliate the lease and to recover any damages occasioned by such contravention. (1) But in fact Hunt had not even the right to resiliate the lease, because he had, if not formally, at least tacitly, consented to the subletting after it had taken place by receiving an extra premium of insurance. (2)

PARKIN, for Hunt, argued there was no consent given in writing by the defendants *en garantie* as there should have been to be of any use to the plaintiff *en garantie*, and to destroy a clause in the written lease. That there was no contract between the parties plaintiff and defendants *en garantie*, and there could be no *garantie simple* where the contracts were separate, that there was no *lien de droit* between the parties, therefore, the one was not liable to the other *en garantie simple*.

ANDREWS, in reply said there was always a *lien de droit* between a party wrongfully causing an injury towards the party injured. The right of a lessee was like that of a vendee in respect of an action *en garantie*.

TASCHEREAU, Justice, after taking the case *en délibéré* gave Judgment in favor of the plaintiff *en garantie*, stating that under the circumstances of the case the action was well founded.

ANDREWS and ANDREWS, for Théberge.

ANDERSON and PARKIN, for Hunt *et al.*

(1) Marcadé, vol. 6, page 441.

(2) Marcadé, *ubi supra*.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL SIDE.

Before :—SIR LOUIS H. LAFONTAINE, Bart., Chief-Justice,
 AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BROWN..... *Appellant*,
 and

WALLACE *Respondent*.

Held :—That an *expert* appointed by the Court, at the suggestion of one of the parties to a suit, can only look to the party so procuring his appointment for payment of his services as such *expert*.

Jugé :—Qu'un expert nommé par la Cour, à la suggestion de l'une des parties dans une cause, ne peut réclamer ses emoluments que de la partie qui a procuré sa nomination.

Judgment rendered the 17th. December, 1860.

The facts of the case are sufficiently set forth in a report to be found in the 10th vol. L. C. Rep., p. 189.

By the judgment of the court below rendered on the 30th June, 1860, the appellant was condemned, jointly and severally with Gugy, his co-defendant, to pay to the respondent Wallace, the sum of two hundred and sixty one dollars.

This judgment submitted to the consideration of the court of appeals was reversed.

SIR L. H. LAFONTAINE, Bart., C. J., dissenting—An *expertise* is ordered, either when requested by the parties or considered necessary by the Judge. In the matter referred for their report the *experts* take the place of the Judge, and they are to act impartially between the plaintiff and the defendant, towards whom they incur an indivisible obligation. Hence it is that the old law holds both parties liable for the *experts'* fees. While I practised at the Bar the *experts* always got their accounts taxed and obliged both parties to pay. There is also an *arrêt* of the *Conseil Supérieur* of Quebec, dated 11th March, 1886, confirmatory of this view of the case, condemning the defendants to pay all the costs of an *arpentage*, although the plaintiff alone was held liable for the other costs in the case.

DUVAL, J.—No case has been more fully discussed in Chambers than the present one, and if we decide against the old *arrêts* it is because they were contrary to more ancient decisions. If there be no agreement between the *expert* and the parties in the cause, we must inquire into the law to ascertain their liability. We can find no *arrêt* on this subject before 1671, and to show that that *arrêt* and the *arrêt* of 1769 were little regarded, it is only necessary to say that the most celebrated jurists, after full discussion of the question, have come to the conclusion that there is no *solidarité*. Carré et Chauveau abandon the idea of *solidarité*, but say there is *indivisibilité*; Dumoulin and Pothier do the same, and Merlin expresses no opinion. The *expert* here acts as a *commissaire enquêteur*, but it was not so in France. If the *expert's* fees are to be exigible from both parties because the *expertise* is necessary to the determination of the suit, why not the clerk's, whose services are as indispensable as those of the Judge. If any one is to be favored by *solidarité*, it should be that officer whose assistance is always required in the conduct of a cause. As to the taxation of the *expert's* account, there is no doubt the ordinance of 1667 requires it, but I would not, under the circumstances, dismiss the respondent's action for want of this formality. I have come to the conclusion, however, with reference to his right to recover from both parties, that there is neither *solidarité* or *indivisibilité*. The *expert* ought not to be obliged to proceed unless he is paid, and he might even exact payment before hand, but we cannot compel one party to pay the costs of the other.

MEREDITH, J., dissenting—The learned counsel who argued this cause for the appellant stated that the question to be decided in this case is, as to the right of the judge in the court below to submit the *serment supplétoire* to the plaintiff; and I must say that as to this point the case does not present any difficulty to my mind. In the state in which the record was, and more particularly with the evidence of Mr. Baillargé before him, I think the learned judge was perfectly justifiable in taking the oath of the plaintiff.

It has however been contended that the plaintiff should have produced a copy of the *acte* showing that he was sworn, and a copy of the report, from which the court could judge of the nature and value of the respondent's services. But the issue raised between the parties, is not as to whether the plaintiff was sworn as an *expert* or not, or as to whether he made a report as such or not. The defendant did not plead that the plaintiff neglected his duty in either of these respects. The issue really is as to whether the plaintiff worked a certain number of days, and expended a certain sum of money, in the discharge of his duty as *expert*; and if so, as to whether the defendant is liable for the work so done, and the money so expended.

The copy of the report would not, as to the matters in dispute in this cause, be as good evidence as that which we have of record. The deposition of Mr. Baillargé, with the right of cross examination to the defendant, is better evidence as to the value and nature of the services of the *experts*, than the statements of Baillargé on the same subject in his report, in making which he was not liable to be cross-examined; and the statement of the plaintiff, under the *serment supplétoire*, and in the presence of the judge, as to the number of days he was occupied in the discharge of his duty as *expert*, is as much to be relied on, as his *ex parte* statements on the same subject contained in his report. Moreover, if we had the report before us, although it would show on what number of occasions the *experts* met, yet it probably would not show, and, in an action such as the present, it certainly would not be the best evidence as to the length of time they were employed upon those occasions. For instance the *experts* had to read and consider an immense mass of papers and evidence, and their report would not be the best evidence as to the time so occupied by them.

So far then as regards the questions of fact, I am of opinion that the appellant has no right to complain of the judgment appealed from; and indeed I should not have

deemed it necessary to devote so much attention to this part of the case, were it not that the supposed insufficiency of the evidence was the ground upon which the appellant mainly relied for the reversal of the judgment of the court below.

I now pass to the consideration of the question of law as to whether *experts* have a right to look to the parties in a suit jointly and severally for the amount of their fees. The question is one by no means free from difficulty, and it has been most carefully considered by all the judges.

It cannot be denied that men, who, by their scientific attainments, or experience, enable the judges to adjudicate upon a class of cases, with which they should otherwise find it difficult, if not impossible, to deal satisfactorily, are entitled, when they claim a just remuneration for their services, to the favourable consideration of those, who for the due administration of justice called for their assistance. Accordingly we find that the judges in France, who themselves received fees, held that the fees due to *experts* were entitled to the same privileges as the fees due to the judges; and therefore that the *experts* had a right to look to the parties jointly and severally.

I find three *arrêts* referred to in the books as bearing on this subject, and in all these *arrêts* the question appears to have been decided in favour of the *experts*, the reason generally given, being; "Que les vacations des experts
" sont comme les vacations et épices des juges, lesquelles
" sont dues solidairement."

The first of these *arrêts* was rendered by the parlement de Provence as early as the 11th july, 1671. The second by the parlement de Dijon on the 24th of july, 1769, and the third also by the parlement de Dijon, the date not being given.

The *arrêt* of the parlement de Provence is referred to in

Guyot's Répertoire, (1) and all the three *arrêts* are referred to in the Nouveau Denisart, (2) and in Merlin's Questions de Droit (3) and Répertoire, (4) without, in any instance, so far as I know, the doctrine which they tend to establish being impugned in any way. In the course of the argument, as given in Merlin's Questions de Droit, which preceded the *arrêt* of 1769, the counsel for the *expert* observed : " Qu'il " était d'un usage journalier d'accorder ces sortes d'exécutoires contre l'une ou l'autre des parties ; qu'interventir " cet usage, c'eût été rendre les expertises impossibles, " parcequ'on n'aurait plus trouvé d'expert qui voulut " opérer sans consignation." And Merlin speaking of the last mentioned *arrêt*, says : " et ce qu'il y a de remarquable, " ce tribunal lui même a ordonné l'impression de son " arrêt pour fixer la jurisprudence de son ressort sur cette " matière."

None of the authors above referred to, so far as I am aware, express any opinion as to the point adjudicated upon by these *arrêts* ; but Merlin, whose opinion on this subject is as high as any that can be referred to, speaks of the rule laid down by the *arrêts* already mentioned as : " cette jurisprudence," and in another place as " l'ancienne jurisprudence " and the remarks of Merlin are referred to by Carré without any expression of disapprobation. So far then as we know of the jurisprudence of France before the code on this subject, it must be admitted that the judgment of the court below is in accordance with that jurisprudence.

The majority of the judges of this Court are however of opinion that the three *arrêts* in question, none of which were rendered by the parliament of Paris, are founded upon a reason wholly unsatisfactory ; that the rule which they lay down is contrary to the general principles of law and

(1) Guyot's Répertoire, vbo. Expert, vol. 7, p. 226.

(2) Nouveau Denisart, vol. 8, p. 329.

(3) Merlin, Questions de Droit, vol. 7, p. 64, vbo. Expert, § IV.

(4) Merlin, Répertoire, vol. 11, p. 233.

justice ; and therefore, the question being now raised for the first time before this Court, that those *arrêts* ought not to be deemed binding upon us.

At the first view of the case, and influenced, as every judge ought to be, by the consideration : “ that innovations generally cause more harm and derangement of order by their novelty, than benefit by their abstract utility,” I felt disposed to acquiesce in the *arrêts* of the parlement de Dijon and Provence without looking beyond them. A more careful consideration of the subject has however convinced me that the rule laid down by those *arrêts* would in some cases, produce very great injustice, so much so, that notwithstanding my great desire to avoid innovations, I would now find it very difficult indeed, if not impossible, to give my unqualified adhesion to that rule.

In the course of the observations which I propose to make, I shall have occasion incidentally to point out in what way the injustice to which I have already adverted would be produced. I shall therefore proceed at once to consider what remedy ought, according to the general principles of our law, to be given to *experts* for the recovery of their fees, it being admitted that as to this point we have no settled provision of law, and it being assumed that we have no settled jurisprudence on the subject.

To me it seems that each *expert* ought to have a right of action against the party who names him, and, in addition, that where the *expertise* is ordered at the instance of one of the parties, that all the *experts*, including of course the *tiers-expert*, ought to have a right of action against the party at whose instance the *expertise* was ordered, and, that where the *expertise* is ordered by the judge, *ex officio*, all the *experts* should have a right of action against the party causing the order for an *expertise* to be enforced. The reason for the rule, which I think ought to be observed, being simply, that a person ought to be held

liable for the payment of services which he has caused to be performed ; and that no one ought to be held to pay for services which he has not in any way demanded, and which it cannot be shown he has rendered necessary. The system which I think the general principles of our law would require us to observe, differs but little, if at all, from the rule laid down on this subject in the Code de Procédure Civile ; and it is mainly from the observations of the commentators on the code that I have formed my views.

By the 319th article of the code de Procédure Civile it is provided with respect to *experts* that : “ leurs vacations “ seront taxées par le président au bas de la minute ; et il “ sera délivré exécutoire contre la partie qui aura requis “ l’expertise ; ou qui l’aura poursuivie si elle a été ordonnée “ d’office.”

It is true that under this provision of law, a plaintiff carrying out an order for an *expertise* is bound to advance the fees of the *expert* named by the defendant ; and in like manner a defendant prosecuting an order for an *expertise* is bound to advance the fees of the *expert* named by the plaintiff. But this does not seem to me unreasonable ; for although the court may order an *expertise*, it cannot take place unless some one of the parties deem it for his advantage to cause the order of the Court to be carried into effect. And it appears to me only reasonable that the party who causes the carrying out of a judgment for an *expertise*, should advance the costs incident to a proceeding which he finds necessary for the advancement of his own interests ; whereas I would think it most unjust that the adverse party should be compelled to advance the costs of a proceeding which he did not demand, and which he would gladly have avoided.

As illustrating my views I will suppose that A. B. being a landholder, sues C. D. being a mill owner, on the ground that land belonging to the plaintiff has been injured by inundations caused by the mill dam of the defendant ; that

the defence is the general issue ; that the court, being unable to deal otherwise with the plaintiff's demand, orders an *expertise* ; and that the defendant, fearing the costs of an *expertise*, knowing his adversary to be insolvent, and his demand groundless, refuses to take any part in the proceeding.

In the case supposed, the plaintiff would be compelled either to enforce the order for an *expertise* or to abandon his suit. Under these circumstances it would appear to me only just that the plaintiff should, as regards the *experts*, advance the costs of a proceeding rendered necessary by his own demand ; whereas I would deem it unreasonable that the defendant, before judgment rendered, should be required to advance the costs of a proceeding, without which he would be entitled to the dismissal of the plaintiff's action. And here, in order to show the injustice that might result from the rule binding all the parties jointly and severally liable for the fees of the *experts*, I will further suppose that (in the hypothetical case already put) the plaintiff's action has been dismissed, that the plaintiff has proved to be insolvent, and that the costs of the *expertise*, as in the present case, amount to several hundred dollars. According to the rule under consideration, the whole of the cost of the *expertise* would, in the case supposed, have to be borne by the defendant, although that proceeding was not demanded by him, nor in any way necessary for the support of his defence. I confess I am unable to understand on what ground a court would have a right to subject any party to such an obligation. It is said that an implied judicial contract would intervene between the parties and the *experts* ; but, for my part, I am not aware that courts of justice have any power to make such contracts ; and even if I were satisfied that the court possessed such a power, I should feel that it could not be exercised consistently with justice. I can understand that an insolvent suitor should be allowed to proceed *in formâ pauperis* ; but it would be going too far to say that a party should be com-

pelled to advance the costs necessary to enable his insolvent antagonist to proceed with a demand which might prove groundless.

In the case supposed I have represented the defendant as refusing to take any part in the *expertise*, but even if he named an *expert*, the case would in principle be the same; for the defendant in naming his *expert* would merely exercise a privilege given to him by law, in the course of a proceeding rendered necessary by the demand of the plaintiff, and carried out by him. Besides it is to be observed that a defendant in naming an expert does not add to the costs of the *expertise*; for were he not to name an *expert*, the court would name one for him; it not being in the power of the court, either under the ordinance of 1667, or under the custom of Paris, in a case such as that supposed, to name a single *expert*. (1) The main ground however on which I should hold the plaintiff liable to advance the costs in the case supposed, is that the services of all the *experts* would have been rendered, on his demand, and at his instance. The whole argument seems to me to be summed up in a single sentence by Vasserot: (2) "Chacun est tenu de faire à l'appui de sa demande les justifications nécessaires; et l'expertise n'est qu'un moyen de justifier un droit."

It has been contended that it would be as reasonable to call upon the plaintiff to pay the costs of the defendant's witnesses, as to require a plaintiff to pay the fees due to an *expert* named by the defendant; but a moment's reflection suffices to show that there is a plain difference between the two cases. For instance, in the above supposed case, the plaintiff could not recover a judgment unless an *expert* were named by, or for, the defendant, whereas the examination of witnesses for the defendant could not be deemed necessary for the recovery of a judgment by the plaintiff.

(1) Ord. of 1667, tit. 21, arts. 8 and 9:—Custom of Paris, art. 184:—Lacombe, Rec. de Jur., vbo. Expert, No. 6, p. 290, and authorities there collected.

(2) Vasserot, Manuel des Experts, p. 30.

The *expertise*, therefore, including the services of the defendant's *expert*, would be a *justification nécessaire* for the plaintiff; whereas the depositions of the defendant's witnesses could not be regarded in that light.

It has also been contended that unless *experts* are allowed an action against the parties jointly and severally, it would be useless to order an *expertise*, as proper *experts* would not be willing to act. I am not aware that any serious difficulty has heretofore been found in procuring the services of *experts*; and so far as I am aware the pretension as to the joint and several liability of the parties, is now advanced for the first time in this country. But independently of this answer, it does not appear to me that there is much force in the objection now being considered; for if the party prosecuting the *expertise* were solvent, the *experts* would probably proceed without exacting a deposit to meet their fees; if on the other hand the party prosecuting the *expertise* were not in good credit, the *experts* would of course insist on such a deposit.

It is true that if the party whose demand rendered an *expertise* necessary had neither money nor credit, the *expertise* could not take place. This, in some cases, might be a subject of regret; but assuredly it would not be a sufficient cause for compelling a solvent suitor to advance the expenses necessary for the prosecution of a demand against himself, by an insolvent adversary.

It has also been suggested that *experts* would be less likely to be influenced by undue consideration with respect to the recovery of their fees, if they were secured by a remedy against the parties jointly and severally; but a suitor ought not to be compelled to pay a sum, which he otherwise would not be liable to pay, merely to prevent the possible effect of improper influences on the minds of officers of the court, with respect to the payment of their fees. Moreover the rule which I think ought to be adopted would not have any tendency to cause injustice; for the

remedy of the *experts* for their fees would not in any, even the least degree, depend upon the nature of their report.

I have, I fear, taken up too much time in the explanation of my views as to this part of the case before us. But as I am alone in my opinion, I am anxious that the grounds on which I have formed it should not be misunderstood ; the more especially because, while I am unable to concur in the *considérant* of the judgment of the court below, I am, at the same time, compelled to dissent from the judgment about to be rendered by this Court.

Passing now from the consideration of what ought to be the general rule in matters of this kind, to the facts of the particular case before us, I am inclined to think that the plaintiff has a good right of action against the defendant even under the rule which, according to the general principles of our law, I think ought to be observed in cases such as the present.

The *expertise* in question appears to have been rendered necessary by the demand of the defendant ; and from the fact of the defendant having advanced a part of the costs of the *expertise*, but still more from the nature of the case, it can hardly be doubted that the defendant in this cause was the party who caused the *expertise* to be carried out. The plaintiff, therefore, for the reasons already explained, may be considered to have worked on the demand and at the instance of the defendant, and primarily for his advantage.

In consequence however, probably, of the learned counsel for the plaintiff having relied upon the authorities already referred to, it is not alleged in the declaration that the defendant in this case was the party who caused the order for the *expertise* to be enforced ; and if this Court were disposed to reverse the judgment of the Court below, on that ground, I should deem it my duty to concur in such a judgment, provided it reserved to the plaintiff his

recoursé.—I cannot however concur in the judgment about to be rendered by the majority of the judges, dismissing the action of the plaintiff against the defendant absolutely, and on the ground that an *expert* named by, or on behalf of, one of the parties in a cause, cannot, under any circumstance, look for his fees to any other party than the one by whom he was named.

In addition to the reasons already given as causing me to dissent from this judgment, I may observe that the objection thus urged against the judgment of the Court below, could have been urged not only against each of the *arrêts* above cited, but also against the provision of the *Code de Procédure Civile* already referred to ; and if that objection be well founded (which for the reasons already explained I think it is not) it does seem strange that it should have wholly escaped the attention, not only of the framers of the code, but of the numerous learned commentators who have written on the subject.

I shall merely add that I cannot concur in the opinion expressed by one of the learned Judges of this Court, that the fact of the plaintiff's account not having been taxed ought of itself to have caused the plaintiff's action to be dismissed. The reason which induced two of the learned Judges of the Superior Court to refuse to tax the plaintiff's account have not been explained to us ; but whatever those reasons may have been, it seems to me plain, that as all the parties interested were present, the Court, in term, could do whatever a Judge of the Court could have done in vacation.

MONDELET, Juge.—Sur le fait de la cause, je pense comme les autres juges, qu'il y avait assez de preuve pour justifier la Cour de première instance, de déléger le serment supplétif. Le défaut de production de compte par l'expert, n'a pas été mis en question par les plaidoyers, ce n'est qu'après coup. En sorte qu'il n'y avait pas, à mon

avis, de nécessité d'interroger Browa à cet égard, de l'avoir fait n'affaiblir pas la cause dans tous les cas.

Avant l'Acte de Judicature qui rend suffisante sur un fait, la déposition d'un seul témoin, le serment supplétif n'était déféré que lorsqu'il y avait par deux témoins, une preuve incomplète (*defectus probationum*) (et non pas une demie ou semi-preuve, mot vide de sens) par un seul témoin, doit donc, pour la même raison, suffire pour justifier le juge de déférer le serment supplétif.

Que le rapport des experts soit produit, ou ne le soit pas, il n'importe, puisque par le témoignage de M. Baillargé, il y a, quant au temps consacré à l'expertise, les soins, l'ouvrage, et la nature des vacations, une meilleure preuve que ne l'eût faite le rapport même, et des documents, une preuve qu'il n'eût pas été possible de faire au moyen du rapport.

Je ne vois donc aucune difficulté à dire, que sous ce rapport, le jugement de la Cour de première instance est bien fondé, et j'en adopte volontiers le motivé.

Reste la question de la solidarité des parties, demandeur et défendeur, envers les experts.

Il paraît qu'en France, par un arrêt du 11 juillet, 1671, au Parlement de Provence, on a décidé la question dans l'affirmative. La raison qu'on a donné de cette décision, n'est pas la meilleure assurément, savoir : "que les vacations des experts sont comme les vacations et épices des juges, lesquelles sont dues solidairement." (1)

Il n'est guères nécessaire d'observer qu'un tel ~~seul~~ arrêt, du *Parlement de Provence*, et de 1671, n'est pas une autorité bien imposante pour les tribunaux du Bas-Canada.

Duranton (t. II, No. 200,) ne touche pas à la question. "Lorsque le mandataire," dit-il, "a été constitué par plusieurs personnes pour une affaire commune, chacune d'elles,

(1) Boniface, tome 3, liv. 2, tit. 5, ch. 3.

est tenue solidairement de tous les effets du mandat. (C'est l'art. 2003 du code).

Cette autorité, laquelle au reste est une disposition expresse du code, n'a pas d'application à l'espèce dont il s'agit, chaque partie ayant nommé son expert.

L'article 2076 du code civil de la Louisiane, auquel j'ai référé, parce qu'on l'a cité, ne touche qu'au cas où "une ou plusieurs personnes contractent une obligation envers divers, pour exécuter quelque chose à l'avantage commun de tous les créanciers." Dans ce cas il est évident que "ces contrats créent une obligation qui est conjointe en faveur des créanciers."

La raison de cet article est, cela va sans dire, sans application aux questions dont on s'occupe en cette cause.

On trouve dans le Nouveau Denisart, t. 8, vbo. Expert, No. 15, p. 329, sec. III. un autre arrêt rapporté comme ayant été rendu au Parlement de Dijon, le 24 juillet, 1769.

On opposait à l'expert qu'on ne l'avait pas nommé, qu'on avait payé son propre expert, et qu'on ne devait pas payer celui de l'adverse partie, qu'on était exposé à perdre son recours, et qu'il en devait être des experts, comme des procureurs et des témoins qui ne doivent être payés que par les parties qui les emploient.

L'expert soutenait de son côté qu'il n'y avait point de comparaison à faire entre les procureurs ou les témoins et les experts ; que les experts ne travaillaient point pour leurs parties, mais pour la cause commune ; qu'ils faisaient fonctions de juges ; qu'ils devaient plutôt être assimilés aux notaires, qui, pour leurs droits, peuvent s'adresser à toutes les parties qui ont pari dans leurs actes ; qu'il en est des salaires de l'expert, comme des épices des juges, qui sont à la charge de toutes les parties.

Ainsi, nous voilà avec deux arrêts, l'un du Parlement de Provence en 1671, et l'autre du Parlement de Dijon en 1769, qui, pour nous, n'ont, comme de raison, aucune

force d'autorité. En France même, l'on n'aurait pas pu dire qu'il y avait, à cet égard, une jurisprudence quelconque. (1)

La Cour de Cassation et Merlin semblent regarder le code comme exprimant le principe consacré quant à la solidarité, par ce qu'on appelle (*gratuitement*) l'ancienne jurisprudence, il n'y avait que les deux arrêts cités plus haut. Carré et Chauveau admettent ce qu'ils ne pouvaient nier, que la solidarité ne se présume pas. Et il paraît que l'on s'est décidé en faveur de la solidarité, par la raison que l'expert peut être regardé comme le mandataire des deux parties, lorsqu'il a été nommé sur leur poursuite, *ou de leur aveu*, et dans leur intérêt respectif. Je comprends que s'il n'y avait *qu'un* expert, nommé *de l'aveu* des deux parties, il en serait peut-être autrement, mais ici il s'agit de deux experts.

Au reste (voir Carré et Chauveau, p. 126) il y a des décisions contraires.

La Cour de Cassation a jugé que la dette en pareil cas, pouvait être considérée *indivisible*.

Pourquoi ? cela n'est pas dit. N'est-ce pas tourner dans un cercle vicieux ?

L'on peut consulter Merlin, Répertoire, vbo. Expert, sec. IX. Cette autorité n'est autre chose que la reproduction de ce qu'on trouve dans Guyot et Denisart au sujet des arrêts de 1671 et 1769, et de la raison que donne Boniface : " que les vacations des experts sont comme les vacations et épices des juges, lesquelles sont dues solidairement."

Merlin renvoie à ses Questions de Droit, vbo. Expert, sec. IV, sous la question : " Avant le code de procédure civile, les experts avaient-ils, pour leurs honoraires, une action solidaire contre chacune des parties pour lesquelles ils avaient opéré ? "

(1) Carré et Chauveau, t. 3, p. 126.

C'est une répétition détaillée de l'arrêt de 1769, tel que rapporté plus haut, et il renvoie à son Répertoire, vbo. Expert.

On n'en est pas plus avancé, et on ne se trouve appuyé que des deux arrêts rendus dans des parlements qui n'ont pu avoir aucune autorité en fait de jurisprudence quant à nous. D'ailleurs les raisons de ces arrêts ne sont pas propres à satisfaire un esprit qui en cherche de bonnes.

Il n'y a donc jamais eu de jurisprudence (au moins l'on n'en trouve pas de traces) dans le Parlement de Paris.

Si la Cour d'Appel du Bas-Canada juge qu'il y a solidarité, elle ne le peut faire qu'en posant *gratuitement* le principe qu'il y a indivisibilité de droit chez les experts ; mais encore, paraît-il manquer l'élément indispensable pour rendre logique et justifier cette règle, je veux dire qu'il y ait eu, comme dans l'espèce de la Cour de Cassation, un seul expert nommé de l'aveu des deux parties, ce qui n'est pas le cas ici.

Il me paraît donc fort douteux que l'un des experts ait son recours solidairement contre les deux parties demandeur et défendeur.

Si c'est un principe qu'il y a indivisibilité de droit chez les experts, ce principe s'il est juste, devra recevoir une application à toutes les causes où il y a eu plusieurs experts. Supposons le cas de la nomination d'un expert par une partie, à laquelle nomination la partie adverse, qui a nommé son propre expert, s'oppose pour de bonnes raisons. Ces raisons sont sans effet sur l'esprit de l'adverse partie, l'expert est nommé : on ne dira pas que la nomination de ces experts a été de l'aveu des deux parties, motif de la décision de la Cour de Cassation en faveur de la solidarité. Sera-t-il donc logique et juste de décider que la partie qui n'a pas voulu nommer un expert, qui s'y est opposé, soit solidaire à payer avec la partie de l'aveu de laquelle il a été nommé ? Il est permis d'en douter.

On peut répondre, peu importe l'opposition de l'une ou de l'autre partie ou même des deux à la nomination des experts : c'est la Cour qui les nomme, le contrat se fait avec la justice, c'est un contrat judiciaire qui lie toutes les parties pour lesquelles, indistinctement, agissent les experts qui deviennent les officiers de la Cour qu'ils aident et assistent à rendre la justice que réclament les parties. Et de fait, l'expert du demandeur décidera peut-être contre lui, et *vice versa* ; de plus, lorsque la Cour nomme un tiers expert pour départager les deux autres, ou nomme un expert fait par les parties de l'avoir fait, sera-ce la Cour qui le payera ? Non, sans doute, ainsi il faut toujours en revenir à l'indivisibilité, c'est une nécessité.

La réponse à cette objection qui est beaucoup plus spécieuse que solide, me paraît être que si l'expertise a été ordonnée par le tribunal, et que ce soit dans l'intérêt de l'une des parties, c'est cette partie qui sera tenue de payer les experts, si elle a adopté le rapport ou si elle a opté pour l'expertise. Si l'expertise a été ordonnée comme d'ordinaire, mais qu'en cas de partage d'avis, la Cour d'office a nommé un tiers expert, le même principe devra avoir son application, et ce sera à celle des parties qui a opté pour l'exécution de l'expertise, ou plutôt pour la complétion de l'expertise, par la nomination *ex-officio* d'un tiers, à payer les experts, car dans tous ces cas là, l'on peut dire que c'est de l'aveu de cette partie que l'opération s'est faite.

Ainsi, il me semble après mûre réflexion, que l'idée de l'indivisibilité n'est pas exacte, c'est une perversion de la signification de ces mots : dans tous les cas c'est une conséquence tirée sans antécédent, c'est purement dire " il y a indivisibilité parce qu'il est impossible de prouver qu'il y a solidarité, et comme il n'y a ni principe ni jurisprudence pour établir la solidarité, sortons d'embarras, et posons gratuitement un autre principe, savoir : qu'il y a indivisibilité." Ce raisonnement, ou plutôt cette tranchante

décision, n'a rien pour l'appuyer ; elle n'est pas logique, assurément ; elle n'est pas légale, cela a été démontré ; elle n'est pas juste, il suffit de l'énoncer pour la faire apercevoir sous son véritable aspect.

Quant à la décision citée par l'hon. Juge-en-Chef, rendue par le Conseil Supérieur de Québec, 11 mars, 1886, elle constate, à mon humble avis, que la Cour qui l'a rendue, s'est trompée, comme celle du jugement de laquelle l'on appelle en cette cause.

Après m'être efforcé d'envisager cette importante question sous les points de vue qu'elle présente théoriquement et pratiquement, je me suis enfin décidé à me ranger contre la solidarité, et j'opine pour l'infirmité du jugement dont est appel.

The judgment of the Court is as follows.

“ La Cour^{*****} considérant que l'expert nommé par une partie, ou nommé par la Cour, sur le choix de la partie, n'a de recours, pour le paiement de ses frais, honoraires ou émolumens, que contre telle partie, l'autre partie, ou les autres parties au litige, n'étant pas tenues et obligées solidairement envers tel expert :

Considérant que le dit Alexander Wallace n'a aucunement établi qu'il ait été dans aucune cause choisi ou nommé, comme expert, par le dit William Brown, non plus que nommé par la Cour, de l'aveu de ce dernier ; mais attendu qu'il est en preuve que le dit Alexander Wallace a été choisi et nommé comme dit expert, par l'autre partie au litige :

Considérant, par conséquent, que le dit Alexandre Wallace n'a aucun droit d'action contre le dit William Brown, tel qu'il le prétend ;

Considérant que, dans le jugement dont est appel, savoir : le jugement du trente juin, mil huit cent soixante, rendu par la Cour Supérieure du Bas-Canada, siégeant à

GUGY, for respondent.

Before :—STUART, Justice.

No. 275. { BARDY..... *Plainiff.*
 { vs.
 { HUOT..... *Defendant.*

Held:—That the prescription of five years enacted by the 10th. and 11th Vic. cap. 28, sec. 16, is an absolute prescription, a bar to the action, *fin de non-recevoir*, and is not a mere presumption of payment.

Jugé :—Que la prescription de cinq ans établie par la 10^{me.} et 11^{me.} Vic., cap. 26, sec. 16, est une prescription absolue, une fin de non-recevoir, et n'est pas une simple présomption de paiement.

Judgment rendered the 4th. February, 1861.

The plaintiff was a physician and brought his action as such for the recovery of the sum of \$624.

The defendant pleaded, 1o. the general issue, and 2o. a perpetual *exception peremptoire en droit*, by which it was alleged: 1stly. That the care and attendance given, and the medicines furnished by the plaintiff, more than five years before the institution of the action, were prescribed under the provisions of the 10th. and 11th. Vic. cap. 26, sec. 16, and that the prescription established by that statute in relation to such care and attendance, and to such medicines so furnished five years before the institution of the action, was a bar to the claim of the plaintiff for the same, a *fin de*

non-recevoir ; and 2dly. That the charges made were exorbitant, and that the attendances and medicines charged had not been given and furnished, the malady not being serious and not requiring constant visits, and that the visits made by the plaintiff, if any were made, were made by him as a friend.

STUART, Justice.—Two questions are presented for decision, the one purely a question of law, that of the prescription pleaded, and the other one of fact as to the extent of the services performed and their value.

A glance at the law of France as it prevailed in this country up to the passing of the Provincial Statute invoked by the defendant, will serve to elucidate the decision about to be rendered upon this point. The prescription against medical men was contained in the 125th. article of the Custom of Paris. “*Les médecins, chirurgiens et apothicaires doivent intenter leurs actions dedans un an, et après le dit an ne sont recevables.*” It is not very possible for any law to convey a prohibition in more peremptory terms, the intention of the law that medical men should not bring any action after the lapse of a year from the rendering of their services is expressed in a manner free from ambiguity, and leaving no room for interpretation or construction. The Ancien Denisart cited at the bar says : “*L'article 125 de la coutume ne donne d'action aux médecins pour le paiement de leurs consultations et visites que pendant un an après qu'elles sont faites, et après ce temps la coutume prononce contre eux une fin de non-recevoir ; mais nonobstant cette prescription s'ils forment leur demande après l'année, on oblige les personnes auxquelles les visites et consultations sont demandées d'affirmer qu'elles les ont payées.*” (1) The deliberate intention of the Courts of France to give an action where one was denied is stated in this authority. This modification of the letter of the Custom came to us as part of the law of the country, and was binding upon us.

(1) Anc. Denisart, vbo. Médecin, p. 302.

This judicial interposition to modify what may be deemed by some the undue severity of the law was not universal in the french Courts, as may be seen by reference to an interesting case in Merlin, where a prescription of two years against the claim of one of our own profession was strictly maintained ;—it is too long to be cited *in extenso*, but the following paragraph will show that the rules of construction cannot properly be dispensed with by the Courts.

“ La disposition de l'article 16 du placard du 4 octobre, 1540, dans laquelle se retranchait Nicolas François est quasi absolue que générale ; elle veut que tous salaires d'avocats et procureurs soient demandés dans les deux ans du jour du service ou labeur fait ; et elle défend après le dit temps d'en faire poursuite judiciaire. Elle n'excepte donc, ni le cas où la cause dans laquelle un homme de loi a prêté son ministère à une partie n'est pas encore jugée, ni le cas où cet homme de loi s'est absenté pendant que cette cause était indécise. (1)

So the law stood at the time of the passing of the 10th. and 11th. Vict., chap. 26, by the 16th section of which it is enacted. “ That so much of *any law* heretofore in force in Lower Canada, as may have fixed the period of prescription with regard to the claim (*demande*) of any person duly licensed to practise physic etc., for *professional services, attendance* or medicine, shall be and is hereby repealed ; and any such claim *shall be prescribed* by the lapse of five years from such attendance, service or medicine furnished, *without any act having been done to interrupt the prescription*, and not before.” The law heretofore existing is repealed and the Legislature enacts a new law. The plaintiff desires this Court to follow in the footsteps of the French Courts and to hold that his action shall not be prescribed by five years, but that the defendant shall be held to swear that the sum is paid. This Court can do no such thing, if the language

(1)12 Merlin, Quest. de Droit, vbo. Prescription, p. 10.

of the Legislature is clear and unambiguous it is our duty to give effect to it. And as the law says that the *claim* of medical men is prescribed by the lapse of five years, the only inquiry is, has that length of time elapsed? It has for the services of 1854, amounting to the sum of \$257, and this amount must therefore be struck out of the demand.

In order that there may be no misapprehension on this subject, proceeding from a reference to the modern law of France, it may properly be stated that the 2273rd. article of the code prescribes the action of medical men by the lapse of one year, and the 2275th. article specifically provides that when this annual prescription is invoked, the parties pleading it shall make oath that there has been payment. The 2277th. article establishes a prescription of five years for arrears of interest etc., and the Courts of France do not admit of the oath being deferred. (1) The same view of the law was taken by the Courts of Law. (2)

During the same session our legislature barred absolutely all actions arising from commercial transactions by the lapse of six years. The spirit of legislation is evidently to compel the early settlement of accounts, and the policy applies especially to a medical man's claim.

With reference to the rest of the claim the evidence is of the most contradictory and unsatisfactory description. A reference is made to what is called a tariff, this is not produced, by whom this was made is not known, nor the nature of the charges authorised; moreover, it would appear that this so called tariff never was homologated, and it does not appear that it is very faithfully followed, except occasionally to justify high charges. There is no legal evidence of the tariff, nor that it proceeds from any body competent to make it. Under these circumstances, with the power which the Courts have to decide upon the subject submitted, (3) the Court finds itself compelled to adopt the value set upon

(1) 1^o. Dallos. Rep. Meth. Leg. Mod., vbo. Prescription, p. 201.

(2) Busk and Flood, 1 Com. Law. Rep., p. 290.

(3) Cout. de Paris, article 125, p. 296.

the services of the plaintiff by Dr. Marsden, who is the only witness who affixes a value to these services for the last malady, namely \$250, and \$10 more for the operation of 1857, making a total of \$260, for which the plaintiff must have judgment. (1)

FOURNIER and GLEASON, for plaintiff.

LÉGARÉ and MALOUIN, for defendant.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chief,
AYLWIN, et DUVAL, Juges, MONDELET, et BADGLEY,
Juges Suppléants.

BLANCHET *et al.*, *Appelants.*
et

BLANCHET *Intimé.*

Jugé :—Que depuis la passation de l'acte de la 41me Geo. III, chap. 4, la délivrance de legs voulue par le droit français sous l'empire de la Coutume de Paris, n'est plus nécessaire.

Held :—That since the passing of the act of the 41st. Geo. III, chap. 4, the *délivrance de legs* required by the french law under the operation of the Custom of Paris, has ceased to be necessary.

Jugement rendu le 8me. jour de mai, 1861.

L'action en Cour Inférieure avait été portée par l'intimé contre les appelants en délivrance de legs ; par une première déclaration, l'intimé alléguait :—

“ Que Jean-Baptiste Blanchet, de la cité de Québec, écuyer, médecin et chirurgien, fit son testament solennel à Québec, devant Mtre. C. M. Defoy et son confrère, Notaires, le vingt sept février, mil huit cent cinquante-quatre :

“ Que le dit testateur, après avoir fait divers legs particuliers, donna tous ses biens généralement quelconques au

(1) Authorities cited.

10 and 11 Vic. cap. 26, sec. 16 :—10 and 11 Vic., cap. 11 :—11 Dalloz., vbo. Prescription, p. 300 et seq :—3 Anc. Dem., vbo. Medecin, p. 302 :—12 Merlin, Qu. de Droit, vbo. Prescription, p. 11 :—1 Com. Law Rep., p. 389 :—Poth., Oblig., No. 176, et seq—Cout. de Paris art. 126, p. 206.

dit demandeur, qu'il institua et nomma par le dit testament son légataire général et universel, auquel il légua tous ses biens, meubles et immeubles, ustensiles de ménage, or et argent monnayés et non monnayés, et de quelque nature et valeur que les dits biens seraient au jour du décès du dit testateur :

“ Que le dit Jean-Baptiste Blanchet est depuis décédé, savoir : à Québec, le ou vers le vingt cinq avril dernier, et a été inhumé dans la paroisse de St. Roch de Québec, le vingt cinq avril dernier, sans avoir révoqué le dit testament :

“ Que le dit Jean-Baptiste Blanchet, n'a laissé à son décès aucun enfant, et sans hoirs de son corps, ni aucun autre héritier en ligne directe :

Que les seuls héritiers et représentants légaux du dit feu Jean-Baptiste Blanchet sont des héritiers en ligne collatérale :

“ Que les dits défendeurs sus-nommés sont les frères germains du dit feu Jean-Baptiste Blanchet, et tous issus du légitime mariage de feu Joseph Blanchet, et feu Dame Marie Euphrosine Cloutier, leur père et mère ;

“ Que les dits défendeurs sus-nommés sont les seuls parents collatéraux qui se refusent, quoique requis, à faire faveur du dit Hilarion Blanchet, demandeur en cette cause, une délivrance du legs universel à lui fait par le dit testament.

“ Pourquoi demande que par le jugement de cette honorable Cour, il soit dit et déclaré et adjugé, que le dit testament sera exécuté suivant sa forme et teneur, en conséquence qu'il sera fait délivrance au dit Hilarion Blanchet, le demandeur, du legs universel y porté en sa faveur, et les dépens.”

A cette action les défendeurs plaidèrent respectivement; 1o. par une défense au fonds en fait, et 2o. par une exception péremptoire en droit perpétuelle :—par cette exception

il était allégué : que l'action du demandeur ne pouvait être maintenue :—

“ Parce que l'écrit portant date à Québec, le vingt-sept février, mil huit cent cinquante-quatre, et mentionné dans la dite déclaration comme étant le prétendu testament de Jean-Baptiste Blanchet, décédé, n'est point le testament du dit Jean-Baptiste Blanchet, ainsi qu'allégué par le dit demandeur :

“ Parce que le dit prétendu testament mentionné en la dite déclaration, n'a point été entièrement écrit, daté et signé par le dit Jean-Baptiste Blanchet, et qu'il n'a point été dicté et nommé par le dit Jean-Baptiste Blanchet, aux notaires devant lesquels il est allégué qu'icelui a été passé, ou aucun d'eux, et que le dit prétendu testament n'a pas été écrit par aucun des dits notaires, en présence du dit Jean-Baptiste Blanchet, et tel que dicté par lui, en la manière et forme voulues par le 289me. article de la Coutume de Paris :

Parce que le dit prétendu testament n'est point le testament et l'ordonnance des dernières volontés du dit Jean-Baptiste Blanchet ; que le dit prétendu testament n'a pas été écrit, daté ou signé, ni dicté et nommé, par le dit Jean-Baptiste Blanchet aux notaires devant lesquels il apparaît qu'il a été reçu, mais qu'au contraire le dit prétendu testament a été dicté par le dit Hilarion Blanchet, et écrit et préparé par Charles Maxime DeFoy, un des notaires qui ont signé le dit testament, et ce, hors de la présence du dit Jean-Baptiste Blanchet, et hors sa connaissance :

Parce que le dit Jean-Baptiste Blanchet n'était point au temps dont le dit prétendu testament porte la date, savoir, le vingt-sept février, mil huit cent cinquante-quatre, sain d'esprit, mémoire et entendement, et n'était point capable de faire et exécuter son testament et ordonnance de ses dernières volontés, ou de faire aucun acte demandant de la réflexion et du jugement, mais qu'au contraire le dit Jean-

Baptiste Blanchet était le dit jour, et longtemps auparavant et après, entièrement incapable d'exercer son jugement et réflexion sur aucun sujet sérieux et demandant l'exercice de la raison :

Parce que lors de la date du dit prétendu testament, savoir : le vingt-sept février, mil huit cent cinquante-quatre, le dit Jean-Baptiste Blanchet était malade depuis longtemps d'une maladie grave qui avait eu l'effet de l'affaiblir considérablement, tant dans son corps que son intelligence, et qu'à la date susdite, savoir : le vingt-sept février, mil huit cent cinquante-quatre, le dit Jean-Baptiste Blanchet, par suite de sa dite maladie, était dans un état complet d'imbécillité et de folie, n'ayant plus l'usage de son intelligence et de sa volonté, et incapable de faire aucun acte sérieux demandant du jugement et du discernement, et que le dit Jean-Baptiste Blanchet, à l'époque susdite, était entièrement incapable de disposer de ses biens judicieusement et avec discernement, n'étant point à l'époque susdite, longtemps auparavant et après sain d'esprit, mémoire, jugement et entendement :

Parce que lors de la date du dit prétendu testament, savoir, le vingt-sept février, mil huit cent cinquante-quatre, le dit Jean-Baptiste Blanchet était entièrement incapable, dans l'état d'imbécillité et de folie, causé par une maladie longue et sévère, où il se trouvait, de donner les instructions pour la préparation et l'exécution de son testament, et que le dit Jean-Baptiste Blanchet était alors entièrement incapable de se protéger contre la fraude qu'on aurait voulu pratiquer contre lui, et que le dit prétendu testament du dit Jean-Baptiste Blanchet, n'est point son testament et ordonnance de ses dernières volontés, et qu'il n'a point été préparé par ses instructions, mais que le dit Hilarion Blanchet, profitant de l'état d'imbécillité et folie dans lequel se trouvait le dit Jean-Baptiste Blanchet, a fait préparer le dit testament suivant ses instructions, et hors la connaissance du dit Jean-Baptiste Blanchet, par Charles Maxime DeFoy, l'un des dits notaires, tel que le dit pré-

rendu testament se trouve maintenant, et le dit testament étant ainsi préparé, les dits Charles Maxime DeFoy et Joseph Peticlerc se rendirent auprès du dit Jean-Baptiste Blanchet dans le but d'exécuter le dit testament, et ce, à la requisition du dit Hilarion Blanchet, ou de l'un de ses amis, et qu'il n'y avait alors présent aucun parent du dit Jean-Baptiste Blanchet, excepté le dit Hilarion Blanchet, ou l'un de ses amis, et que vû l'état d'imbécilité et de folie dans lequel se trouvait alors le dit Jean-Baptiste Blanchet, il était incapable de comprendre le contenu, l'effet et la portée du dit prétendu testament, ou partie d'icelui, lorsqu'il lui fut lu par les dits notaires, et si aucun signe d'assentiment fut donné ou exprimé par lui, ce ne fut qu'en conséquence de l'influence et contrôle exercés sur l'esprit du dit Jean-Baptiste Blanchet, par le dit Hilarion Blanchet, ou par l'un des amis du dit Hilarion Blanchet, et par les suggestions et obsessions du dit Hilarion Blanchet, ou de ses amis :

Parce que le dit testament a été suggéré, et ne contient point l'expression libre et véritable de la volonté du dit Jean-Baptiste Blanchet :

Parce que le dit Hilarion Blanchet a empêché les parents du dit Jean-Baptiste Blanchet de pénétrer auprès du dit Jean-Baptiste Blanchet pendant sa maladie, durant laquelle a été passé le dit prétendu testament, et que par diverses calomnies contre les autres parents du dit Jean-Baptiste Blanchet, et contre le dit Jules Blanchet en particulier, il a profité de l'état d'imbécilité auquel la maladie avait réduit le dit Jean-Baptiste Blanchet, et parcequ'il a employé diverses personnes pour aigrir l'esprit malade, rendu capricieux par la maladie, contre ses autres parents, et le dit Jules Blanchet en particulier, en rapportant contre eux divers bruits mensongers et calomnies au dit Jean-Baptiste Blanchet :

C'est pourquoi le dit Jules Blanchet conclut, à ce que, pour les causes susdites, par le jugement à intervenir, le dit

prétendu testament et ordonnances des dernières volontés du dit Jean-Baptiste Blanchet, et les diverses dispositions d'icelui, soient déclarés et adjugés nuls et de nul effet, et soient annulés, et que l'action du dit demandeur soit renvoyée avec dépens.

Plus tard le demandeur obtint permission d'amender sa déclaration, et le 22 février, 1859, une déclaration amendée fut enfilée comme suit :

“ Que Jean-Baptiste Blanchet, de la cité de Québec, écuyer, médecin et chirurgien, fit son testamont solennel à Québec, devant Mtre. C. M. Defoy, et son confrère, notaires, le vingt-sept février, mil huit cent cinquante-quatre, ainsi qu'il appert par l'expédition produite par le demandeur, et à laquelle il réfère.

Que le dit testateur, après avoir fait divers legs particuliers, donna tous ses biens généralement quelconques au dit demandeur, qu'il institua et nomma par le dit testament son légataire général et universel, auquel il légua tous ses biens meubles et immeubles, ustensiles de ménage, or et argent monnayés et non monnayés, de quelque nature et valeur que les dits biens seraient au jour du décès du dit testateur.

“ Que subséquemment, savoir à Québec, le dix-huit avril, mil huit cent cinquante sept, le dit feu Jean-Baptiste Blanchet fit son codicile devant Mtre. C. M. Defoy et collègue, notaires, par lequel il expliqua certains legs particuliers faits en son testament suscité, confirma en outre le legs universel par lui fait en faveur du demandeur, lequel dit codicile n'a aucunement été révoqué, ainsi que son testament.

“ Que le dit Jean-Baptiste Blanchet, est depuis décédé, savoir : à Québec, le ou vers le vingt-cinq avril dernier, et a été inhumé dans la paroisse de St. Roch de Québec, le vingt-cinq avril dernier, sans avoir révoqué le dit testament.

“ Que le dit Jean-Baptiste Blanchet n'a laissé à son décès aucun enfant et sans hoirs de son corps, ni aucun autre héritier en ligne directe.

“ Que les seuls héritiers et représentants légaux du dit feu Jean-Baptiste Blanchet sont des héritiers en ligne collatérale.

“ Que les dits défendeurs susnommés sont les frères germains du dit feu Jean-Baptiste Blanchet, et tous issus du légitime mariage de feu Joseph Blanchet et feu dame Marie Euphrosine Cloutier, leurs père et mère.

“ Que les défendeurs susnommés sont les seuls parents collatéraux qui se refusent, quoique requis, à faire faveur du dit Hilarion Blanchet, demandeur en cette cause, une délivrance du legs universel à lui fait par le dit testament et codicille, suivant la loi.

“ Pourquoi demande que par le jugement de cette honorable Cour, il soit dit, déclaré et adjugé que le dit testament sera exécuté suivant sa forme et teneur, ainsi que le codicille suscité, en conséquence qu'il sera fait délivrance au dit Hilarion Blanchet, le demandeur, du legs universel y porté en sa faveur, et que les défendeurs soient condamnés à rendre et délivrer au dit demandeur, sous huit jours de la sentence à intervenir, tous les effets mobiliers, or, argent et ustensiles d'agriculture et de ménage dont ils se sont mis en possession au décès du dit testateur, et que les dits défendeurs seront tenus en outre de fournir dans le dit délai un compte sous serment, de tous les effets mobiliers, or, argent et ustensiles dont ils ont eu ainsi la possession, et des argents qu'ils ont reçus provenant des dettes actives de la dite succession, enfin de tout ce qui composait l'actif de la dite succession venue en leur possession, et que faute par eux de ce faire dans le dit délai, et icelui passé, les dits défendeurs soient tenus et condamnés purement et simplement à payer au dit demandeur la somme de dix mille livres courant, pour tenir lieu à ce dernier du reliquat du dit compte, avec intérêt et les dépens en tous les cas.”

A cette dernière déclaration il fut produit une exception péremptoire en droit perpétuelle, par laquelle il était dit :

“ Que le dit Pierre Blanchet n’a jamais eu en sa possession aucuns effets, biens ou dettes, meubles et immeubles dépendant de la dite succession de feu Jean-Baptiste Blanchet, en son vivant, médecin, de la cité de Québec, et qu’au contraire, immédiatement après le décès du dit Jean-Baptiste Blanchet, le dit demandeur a pris et s’est mis en possession de tous les biens, meubles et immeubles, composant la succession du dit Jean-Baptiste Blanchet et en dépendant, et qu’il en est encore en possession. Parce que la présente action est inutile et vexatoire.”

Les articles du testament qui ont donné lieu à la demande en délivrance sont comme suit :

20. “ Je donne et lègue à Hilarion Blanchet, écuyer, médecin, mon neveu, demeurant avec moi, mon emplacement, maison et dépendances que j’occupe actuellement, situés en la Haute-Ville de Québec, au coin des rues des Pauvres et Collins, et joignant au Sud et du côté de l’Est à Christian Hoffman ; pour par le dit Hilarion Blanchet, jouir, faire et disposer de cet immeuble en jouissance et usufruit sa vie durant seulement, et arrivant son décès, le dit immeuble passera et appartiendra à ses enfants nés en légitimes mariages, auxquels je le donne et lègue en pleine propriété ; pour par eux en jouir à compter du jour du décès du dit Hilarion Blanchet.”

30. “ Je donne et legue en outre au dit Hilarion Blanchet, mon emplacement, maison et dépendances, situés en la Haute-Ville de Québec, rue Conillard, joignant du côté de l’Est à Firmin Proulx, et du côté de l’Ouest à Benjamin Corriveau, écuyer, pour par le dit Hilarion Blanchet jouir de cet immeuble au même titre et de la même manière que celui ci-dessus, et après son décès passer à ses enfants, comme susdit.”

40. “ Je recommande au dit Hilarion Blanchet de faire

rebâtir d'une manière convenable la dite maison située rue Couillard, et ce aussitôt que les prix des matériaux et de la main d'œuvre le permettront."

50. " Dans le cas où le dit Hilarion Blanchet décéderait sans enfants issus en légitimes mariages, je veux et entends qu'avant son décès il dispose, soit par donation ou par testament, des deux immeubles ci-dessus mentionnés en faveur de ceux de ma famille qu'il jugera les plus capables d'en profiter ;"

60. " Je donne et lègue en outre au dit Hilarion Blanchet toutes et telles sommes d'argent qui me sont dues par la succession et communauté de feu Joseph Blanchet, son père et mon frère, pour par lui en jouir sa vie durant seulement, et après son décès passer à ses enfants, comme susdit, et au cas de décès sans enfants, en disposer de la manière ci-dessus expliquée ; mais je veux et entends que tant que les terres qui sont hypothéquées à la garantie du paiement des dites sommes, seront possédées par aucun membre de sa famille, soit comme donataire ou légataire d'icelles, lui, le dit Hilarion Blanchet, ne puisse troubler, ni pour le principal, ni pour les intérêts tel donataire ou légataire, ni la veuve du dit feu Joseph Blanchet, sa mère, au cas qu'elle demeure en possession d'aucune partie des dites terres, mon intention étant qu'il ne fasse valoir mes droits que je lui transporte par mon présent testament, que dans le cas où les dites terres, ou aucune partie d'icelles, sortiraient des mains de sa dite famille, soit par vente, donation ou autrement."

Ensuite des dispositions ci-dessus le testament contient les dispositions suivantes en faveur de divers des parents du testateur.

70. " Je donne et lègue à Pierre Blanchet, mon frère, toutes et telles sommes d'argent qu'il me doit, tant en principal qu'intérêts, pourvu qu'il ne dispose pas de ses biens en faveur d'Edouard Blanchet, son fils ; mais qu'il en dispose en faveur d'un ou de plusieurs de ses enfants bien

méritans et capables de les faire valoir ; car dans le cas contraire, le présent legs demeurera nul et caduc, et pareillement ce présent legs demeurera nul et caduc, dans le cas où les dits biens seraient vendus volontairement ou forcément, auquel cas mon légataire universel demeurera revêtu de tous mes droits, privilèges et hypothèques, pour les faire valoir contre qui il appartiendra.”

80. “ Le legs ci-dessus est ainsi fait à la charge par le dit Pierre Blanchet de fournir et livrer à mon frère Jules Blanchet, de la farine de froment jusqu’au montant de la somme de trente livres courant, suivant les prix alors courant, laquelle farine sera livrée par diverses portions, d’année en année, suivant les besoins du dit Jules Blanchet, tels que jugés par le dit Pierre Blanchet ; m’en rapportant à sa discrétion, voulant qu’il ne puisse être troublé à cet égard par le dit Jules Blanchet.

90. “ Je veux et entends que tant que Joseph Théophile Blais et Marie Blanchet, son épouse, et ma sœur, seront en possessions de leurs biens immeubles, ils ne puissent être troublés par mon légataire universel ci-après nommé au sujet de la somme ou des sommes d’argent qu’ils me doivent, tant en principal qu’intérêts, mais arrivant le cas où leurs dits biens immeubles seraient vendus, soit volontairement, soit forcément, alors et dans ce cas, mon dit légataire universel sera tenu de faire le recouvrement des dites sommes, les placer à intérêt le plus sûrement possible, et payer le dit intérêt à la dite Marie Blanchet, ma sœur, sa vie durant, à titre de pension viagère, laquelle, arrivant son décès, demeurera éteinte et amortie.”

100. “ Je donne et lègue à Louis Blanchet, mon frère, la jouissance et usufruit d’une terre, située en la paroisse de St. Pierre, Rivière du Sud, contenant deux arpens de front sur quatre-vingts arpens de profondeur, bornée en front vers le Nord à la dite Rivière du Sud, et parderrière au bout de la dite profondeur, d’un côté vers le Nord-Est à Pierre Bélanger et d’autre côté vers le Sud-Ouest, partie à Jacques

Mercier, et partie à Félix Blanchet, ou leurs représentans ; ensemble avec les bâties dessus construites, circonstances et dépendances ; avec en outre la jouissance et usufruit d'une terre à bois située même paroisse, contenant neuf perches de front sur quarante arpens de profondeur bornée au Nord-Est à Charles Mathieu, et au Sud-Ouest à Félix Blanchet ; pour par le dit Louis Blanchet avoir la dite jouissance et usufruit sa vie durant, seulement, et au cas qu'il décède avant que le plus jeune de ses enfans maintenant nés et vivans, soit parvenu à l'âge de vingt et un ans, la dite jouissance et usufruit sera continuée jusqu'à cette dernière époque en faveur de ceux des dits enfans alors mineurs, et arrivant la majorité du plus jeune des dits enfans, la dite jouissance et usufruit seront éteints et amortis."

110. " Le legs ci-dessus est ainsi fait à la charge par le dit Louis Blanchet, de payer et acquitter à même les revenus des dites terres, le douaire réservé sur icelles aux enfans issus de son premier mariage avec feue dame Marguerite Fontaine."

120. " Je fais remise à dame Françoise, alias Fanny, Blanchet, épouse de François-Xavier Poulin, écuier, médecin, de la moitié des intérêts qu'elle se trouvera me devoir lors de mon décès."

130. " Désirant récompenser Marguerite Langlois des soins et services qu'elle m'a portés et rendus depuis qu'elle est à mon service, je charge le dit Hilarion Blanchet de la loger avec lui, et pourvoir à sa nourriture et entretien, et de toutes choses nécessaires tant en santé qu'en maladie, sa vie durant, en par elle travaillant dans sa maison selon sa force et capacité, et au cas qu'elle veuille quitter sa maison pour aller demeurer ailleurs, alors et dans ce cas le dit Hilarion Blanchet lui payera une pension d'une livre courant par mois, aussi sa vie durant, pourvu toujours qu'elle ne réclame pas le paiement de ses gages pour le passé, auquel cas le dit Hilarion Blanchet sera déchargé de l'obligation ci-dessus."

140. " Je charge en outre le dit Hilarion Blanchet de payer à Adélaïde Langlois, qui est aussi maintenant à mon service une somme de cinq livres courant, en sus de ses gages pour le temps qu'elle aura été à mon service, et ce pour la récompenser des bons services qu'elle m'a rendus."

150. " Je charge en outre le dit Hilarion Blanchet de garder avec lui Céline Blais, que j'ai élevée, et qui demeure maintenant avec moi, et la fournir de toutes choses nécessaires à la vie jusqu'à ce qu'elle soit pourvue par mariage ou autrement, et de lui payer une somme de cent livres courant, lorsqu'elle quittera la maison, soit par mariage ou autrement, la dite somme de cent livres courant payable comme suit, savoir : trente livres pour la fourniture d'un petit ménage lorsqu'elle se mariera, si alors autant lui reste dû sur la dite somme de cent livres courant, et le reste par somme de six livres courant, payable d'année en année à compter du jour de mon décès."

Et enfin le testateur dispose du résidu de ses biens comme suit :

160. " Quant à tous mes autres biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, de quelque nature et valeur qu'ils soient, je les donne et lègue au dit *Hilarion Blanchet*, mon neveu, pour par lui en jouir, faire et disposer en pleine et entière propriété à compter du jour de mon décès, l'instituant *mon légataire universel, et mon exécuteur testamentaire.*"

Le jugement final en Cour Inferieure est comme suit :

La Cour, etc. :—" Considérant que la demande du demandeur est bien fondée ; considérant que les défendeurs n'ont nullement établi les allégués essentiels énoncés en leurs plaidoyers respectifs en cette cause, rejette les exceptions par eux filées en icelle, et ordonne que le testament de feu Jean-Baptiste Blanchet, Ecuier, Médecin et Chirurgien fait et passé à Québec, devant C. M. DeFoy, et son confrère notaires, le vingt-sept février, mil huit cent cinquante-

quatre, et le codicile du dit Jean-Baptiste Blanchet, fait et passé à Québec, le dix-huit avril, mil huit cent cinquante-sept, devant C. M. DeFoy et son confrère, notaires, soient exécutés selon leur forme et teneur. En conséquence, la Cour fait délivrance par le présent jugement au dit Hilarion Blanchet, du legs universel à lui fait par le dit testament et le dit codicile, ensemble des fruits des immeubles et intérêts du mobilier, de plus ordonne qu'à payer et vider leurs mains en les siennes des dits fruits et intérêts seront contraints les locataires et fermiers des immeubles, les débiteurs des rentes et sommes mobilières produisant des intérêts et composant le dit legs, quoi faisant déchargés, etc."

Les parties entendues en Cour d'Appel—ce jugement fut infirmé,—le Juge-en-Chef et son honneur le Juge Duval étant d'opinion que le jugement de la Cour Inférieure devait être maintenue.

Sur une question aussi importante que celle soumise au tribunal de dernier ressort en ce pays—nous croyons devoir donner *in extenso* les motifs qui ont déterminé les membres de la Cour à se décider soit pour ou contre l'infirmité du jugement du tribunal de première instance. (1)

SIR L. H. LAFontaine, Bart., Juge-en-Chef. — L'intimé, légataire universel du Dr. Blanchet, son oncle, a intenté une action en délivrance de legs. Cette action a été dirigée contre des frères du testateur, comme étant ses plus proches héritiers.

On a soulevé la question de savoir si, un testateur ayant disposé de tous ses biens par testament, il y avait encore lieu à la saisine légale en faveur de l'héritier du sang, ou si, au contraire, cette saisine passait de plein droit au lé-

(1) Ce jugement a l'effet, ainsi que le dit le Juge-en-Chef dans sa savante dissertation que nous reproduisons, de décider dans la négative une question qui avait toujours été décidée dans l'affirmative, si ce n'est dans la cause particulière de Richardson et Desrivières, cause qui s'est présentée en appel sous des circonstances toutes exceptionnelles, R. d. Déc. B. C.

gataire universel à l'exclusion de cet héritier. En d'autres mots, dans un tel cas, la règle, " le mort saisit le vif etc.," établie par le Droit Coutumier, doit-elle, ou non, continuer d'exercer son empire ?

Pour soutenir la négative, on argumente du statut impérial de 1774 (généralement appelé " l'Acte de Québec.") et de notre statut provincial de 1801, chap. 4. En effet, si ce n'était de l'existence de ces deux lois statutaires, l'on admet que la prétention des appelants serait sans fondement.

Cette question paraît avoir été déjà soulevée plusieurs fois, et comme on ne rapporte aucune décision qui ait maintenue la négative, j'en conclus ou que nos tribunaux se sont prononcés, en principe, pour l'affirmative, ou que des circonstances particulières aux espèces qui se sont présentées, ont dû faire écarter la question. On cite, comme favorable aux défendeurs, une opinion que feu M. le Juge Pyke a exprimée dans la cause de *Desrivières et Richardson*. J'avoue que cette opinion abonde dans le sens des défendeurs. Mais c'est une opinion isolée, que l'état de la procédure n'appelait pas, de l'aveu même de M. le Juge Pyke, et rien ne fait voir que cette opinion fût partagée par les autres membres du tribunal. (1) Que l'on remarque que M. le Juge-en-Chef Reid n'avait pas siégé dans cette cause.

Dès 1819, on trouve que la Cour du Banc du Roi à Québec avait reconnu que " le mort saisit le vif." " A common law legacy therefore, vests in the heir at law, and he is not divested of the same until a *délivrance de legs* has been obtained." (2)

On trouve, au 4e tome des " Déc. des Trib. du B. C., p. 121," une décision de la Cour Supérieure, rendue dans le district de St. François, par MM. les Juges Day, Short et Caron, qui a maintenu que la délivrance de legs était encore nécessaire. C'était en 1854—M. le Juge Day a

(1) *Stuart's reports*, p. 218.

(2) *Campbell vs. Shepherd et Chartier*, *Stuart's reports* p. 138.

pratiqué au Barreau de Montréal, M. le Juge Caron au barreau de Québec, et M. le Juge Short, au barreau de Québec et à celui de St. François ; d'où j'infère que telle devait être, suivant eux, la jurisprudence des Cours de ces trois districts. M. le Juge Day observa en cette occasion : " The doctrine is incontrovertible, that the legatee is not vested with the legacy prior to *délivrance*. The dictum of the late Mr. Justice Pyke in *Desrivieres* and *Richardson*, relative to *délivrance de legs*, and that want of it was not a valid exception in the mouth of third parties, does not prevail." C'était désapprouver, on ne peut plus, l'opinion de M. le Juge Pyke, puisque M. le Juge Day allait jusqu'à dire que le défaut de *délivrance* pouvait être un bon moyen d'exception de la part des tiers. Le Juge Pyke lui-même prit soin de déclarer que l'opinion qu'il exprimait, ne s'appliquait qu'au cas particulier de *Desrivieres* et *Richardson*, en disant : " It must not be concluded from any thing that has fallen from the Court that it considers the maxim, or the article of the *Custom* " le mort saisit le vif &c.," as now entirely without effect in Canada, &c., &c. We are called upon to decide only the case before us, and not upon cases which may be differently circumstanced, &c., &c."

Dans la cause de *Desrivieres* et *Richardson*, il n'apparaissait pas qu'il y eût aucun héritier du sang du testateur ; du moins, aucun tel héritier ne s'était présenté en Canada.

Avant d'entrer dans l'examen de la question de savoir si les deux statuts de 1774 et de 1801, peuvent avoir trait, même de la manière la plus indirecte, à la délivrance de legs, je dois faire remarquer que c'est à tort que les appelants en ont appelé au jugement rendu par cette Cour le 1er. mars, 1858, dans la cause de *Quintin* et *Girard*, confirmatif de celui prononcé par la Cour de première instance, à l'opinion que j'ai exprimée à ce sujet, et à l'interprétation que j'ai alors donnée aux deux statuts. Ce n'était pas la question de délivrance de legs dont il s'agissait, mais bien

celle de la *légitime*. (1) Nul jugement, ni aucune partie de mon opinion, dans la cause de *Quintin* et *Girard*, ne sauraient être invoqués à l'appui du système des appelants en la présente cause.

Dans notre ancien droit, il y avait des *réserves* au profit des héritiers du sang ; il y avait aussi des *incapacités de recueillir*, dont certaines personnes étaient frappées. Les quatre quints des propres étaient ainsi *réservés*. Le statut de 1774 a fait disparaître cette *réserve*. A cette occasion, je disais, dans la cause de *Quintin* : “ On a pensé, et c'est ce que nous a dit l'avocat des appelants, que l'acte de 1774 n'avait eu d'autre effet que de donner à la faculté de disposer par testament la même étendue qu'avait celle de disposer par acte entre vifs : c'est-à-dire qu'à l'avenir un testateur pouvait léguer ‘ tous ses meubles et héritages propres, acquêts et conquêts à personne capable.’ (Art. 272 de la C. de Paris). Supposant donc que ce soit là le seul effet qu'ait dû produire le statut impérial, c'est du moins reconnaître de la manière la plus formelle qu'il a aboli la *réserve* coutumière des quatre quints des propres dont l'article 292 de la Coutume de Paris ne permettait pas de disposer par testament. Ainsi, si, dans l'acte déclaratoire de 1801, l'on retrouve le mot *réserve*, il devra nécessairement s'entendre d'une autre réserve que celle des quatre quints.” Le statut de 1774 n'avait donc pas fait disparaître toutes les *réserves* ; il en laissait subsister, entre autres, celle de la *légitime*. Il n'avait pas, non plus, touché aux *incapacités de recueillir* préexistantes ; il les laissait toutes subsister. Si, dorénavant, un individu pouvait disposer par testament de la totalité de ses propres, il ne devait le faire qu'au profit de personnes *capables*.

Dans cet état de choses, le statut provincial de 1801 fut promulgué. D'un côté, il avait pour objet d'abolir les *réserves* qui pouvaient encore exister, et, par cela même, de donner au testateur une liberté illimitée de tester, c'est-à-dire de disposer de *tous ses biens, sans que personne pût,*

(1) Dée. des Trib. du B. C., p. 317. tome 8.

comme par le passé, demander, à aucun titre quelconque, en dehors du testament, ou plutôt malgré ce testament, une détraction sur ces mêmes biens. De l'autre côté, le statut avait pour objet de faire disparaître, en quelque sorte, presque toutes les *incapacités de recueillir* préexistantes.

Les *réserves*, et les *incapacités de recueillir*, ne portaient que sur les biens, ou plutôt sur le pouvoir d'en disposer ou de les acquérir. Les unes disparaissant pour ainsi dire en entier, et toutes les autres disparaissant à peu d'exception près, l'on peut conclure, comme je l'ai dit, dans la cause de *Quintin et Girard*, que le statut de 1801 proclamait la liberté illimitée de tester. Mais il ne s'ensuit pas qu'un testateur, tout en exerçant cette liberté de tester de tous ses biens, puisse méconnaître et réduire au néant des lois d'ordre public, des droits que ces mêmes lois ont consacrés indépendamment de sa volonté, et qu'il faut respecter, droits qui subsistent d'eux-mêmes par la loi commune, et qui, éventuellement, peuvent être reconnus, et peuvent assurer à l'héritier du sang, la propriété des biens de la succession du testateur, nonobstant le testament que l'on représente de la part de ce dernier. Il ne s'ensuit pas, non plus, qu'en disposant de tous ses biens, il puisse le faire de manière à leur donner une destination que des lois positives défendent de leur donner. Par exemple, une loi d'ordre public, l'article 125 de l'ordonnance de 1629, prohibe la substitution d'effets mobiliers. Tout individu avait, avant nos deux statuts de 1774 et 1801, comme il a continué de l'avoir depuis, le pouvoir de disposer de ses biens mobiliers d'une manière illimitée. Cependant il ne pouvait pas, et ne pourra pas les donner à charge de substitution, parcequ'une loi positive, à laquelle les statuts de 1774 et de 1801 n'ont pas touché, le défend. Un testateur est donc obligé, dans la disposition qu'il fait concernant sa succession mobilière, de subir les exigences de cette loi. Il en doit être de même de la loi qui fixe les degrés d'une substitution des biens immeubles. Du reste,

les substitutions sont contraires à l'esprit et à l'objet de notre nouvelle législation sur les testaments. Il ne faut donc pas les étendre.

Une autre loi, qui a éminemment le caractère de loi d'ordre public, est celle qui est consacrée par cette règle du droit coutumier : " Le mort saisit le vif, son hoir plus proche et habile à lui succéder."

Le demandeur, intimé, a invoqué cette règle à l'appui de sa cause, et il l'a fait dans un *factum* qui témoigne hautement des talents et des connaissances légales de l'avocat qui l'a rédigé, talents et connaissances que nous avons eu, plus d'une fois, occasion d'apprécier. (1) J'adopte presque tous les raisonnements qui se trouvent au *factum*. C'est donc dire que je suis d'opinion que la délivrance de legs est encore une formalité nécessaire, que la saisine légale appartient à l'héritier du sang, et non au légataire universel, ou à titre universel. Je ne trouve rien dans les statuts de 1774 et de 1801, d'où l'on puisse inférer l'abolition de cette saisine, ou l'abrogation de la règle " le mort saisit le vif etc." Il eut fallu une disposition expresse pour abroger l'article de la Coutume de Paris, qui établit cette règle, comme il en a fallu une, dans l'acte de 1801, pour faire disparaître des *réserves* et des *incapacités* qui avaient continué de subsister nonobstant le statut de 1774. Il ne suffit pas de dire qu'en pareil cas la délivrance de legs n'est plus une formalité nécessaire, qu'elle est même inutile. Les uns peuvent le croire, et d'autres peuvent croire le contraire. Il y aurait, ce me semble, de la témérité à reconnaître, par simple induction ou supposition, l'abrogation d'une loi comme résultant d'un statut qui garde le silence le plus profond sur cette prétendue abrogation, sur la loi elle-même que l'on dit avoir été ainsi abrogée, tandis que le statut, touchant à d'autres lois, en prononce l'abrogation en termes si clairs et si précis qu'il n'y a pas lieu d'entretenir le moindre doute sur l'intention du législateur.

(1) Ce *factum* a été rédigé par feu F. R. Angers. Ed. Dée. B. C.

Le législateur de 1801 savait que, sous la Coutume de Paris, il y avait des cas où tous les biens d'un testateur pouvaient passer à des légataires, sans qu'il en restât la moindre parcelle pour l'héritier du sang. Prenons le cas actuel. Il n'y a pas de *propres* dans la succession du docteur Blanchet. Tous ses biens sont des meubles et des acquêts. Ses frères sont ses plus proches parents, et par conséquent ses héritiers du sang. Le légataire est son neveu, fils de l'un de ses frères, lequel frère est encore vivant ; ainsi le légataire n'était pas au nombre de ses héritiers. Il était dans la position d'un étranger vis-à-vis de la succession. Au moyen du testament, sous l'empire de la Coutume de Paris, l'intimé aurait recueilli tous les biens du testateur, et les frères de celui-ci, ses héritiers du sang, n'auraient rien eu. Cependant ils auraient été *saisis*, et le légataire, quoique recueillant tous les biens, aurait été obligé de leur demander *délivrance*. Si, dans ce cas, la *délivrance* est inutile aujourd'hui, elle l'était également alors. Elle n'en était pas moins exigée ; la loi la rendait nécessaire, et cette loi n'a pas été changée.

“ Quand un défunt qui n'aurait eu que des meubles et des acquêts,” dit *Laurière*, “ en aurait disposé par son testament en faveur d'un étranger, en l'instituant héritier au préjudice de son héritier légitime et présomptif, l'héritier présomptif habile à succéder en serait toujours saisi, ou en aurait la saisine, parceque suivant la loi, il est l'unique héritier, au lieu que l'étranger n'est qu'un légataire, qui est obligé de demander délivrance : ce droit est renfermé dans la règle qui compose cet article, *le mort saisit le vif, son hoir plus proche et habile à lui succéder.*”

Si le nouveau Code Français a apporté quelque modification, il l'a fait par une disposition expresse, et encore seulement par voie d'exception. Notre législature n'a encore rien fait de semblable. Au contraire, elle a repoussé une proposition faite dans ce sens.

“ L'on ne peut tirer argument des dispositions du Code Civil. (J'emprunte ici au *factum* de l'intimé.) La saisine

héréditaire et la nécessité de la demande en délivrance de legs ont été conservées, sauf l'exception contenue dans l'article 1006. Cet article est comme suit : " Lorsqn'au décès du testateur il n'y aura pas d'héritiers auxquels une quotité de ses biens soit réservée par la loi, le légataire universel sera saisi de plein droit par la mort du testateur, sans être tenu de demander la délivrance." Voilà une dérogation expresse à l'ancien droit, qui ne laisse aucun doute. Le législateur a cru devoir exprimer, en termes formels, que le légataire, dans le cas particulier, serait saisi de plein droit, sans être tenu de demander la délivrance, pour le soustraire aux dispositions de la règle générale contenue en les articles 1004 et 1011, lesquels donnent la saisine à l'héritier et obligent le légataire universel de demander la délivrance. Il suffit de comparer cet article 1006 avec la disposition de la 41e. Geo. 3, chap. 4, pour se convaincre de la différence entre ces deux lois. Il y a dans la première une exception à la règle générale exprimée dans les termes les plus énergiques, qui n'existe pas dans notre droit.

" Voici comment s'exprime Toullier, vol. 5, no. 540 :

" L'action personnelle ou en délivrance n'est pas seulement un droit accordé aux légataires ; c'est de plus un devoir que la loi leur impose. Ils doivent recevoir leurs legs de la main de l'héritier ou de la justice ; car ils n'ont pas le droit de possession ou la saisine des biens légués, hors le cas unique dont nous avons parlé nos. 495 et 520," (ce cas est l'exception de l'article 1006 cité plus haut.) " Le testateur lui-même ne pourrait donner au légataire la saisine des biens légués, ni le dispenser de la demande en délivrance."

" Dans les articles 490 et suivants, Toullier examine quelle était la loi sur ce point dans les pays de Droit-Ecrit, et passant aux règles du Droit Coutumier, il dit :

" Dans les pays de coutumes, . . . les legs furent permis, mais on n'y reconnut jamais d'autres héritiers que ceux

“ du sang. On y établit pour maxime, *qu’institution d’héritier n’a point lieu.*”

“ Et après avoir cité la Coutume de Paris et d’autres, il ajoute au no. 491 : “ Dans ces coutumes, le testateur qui “ n’avait point de propres pouvait donner tous ses biens par “ testament. Il pouvait donc faire un légataire universel, “ mais il ne pouvait pas faire un héritier, quand même il aurait donné ce nom au légataire universel. C’était toujours “ l’héritier du sang qui était saisi de plein droit de tous “ les biens de la succession, en vertu de la règle *le mort saisit le vif*. C’était toujours l’héritier du sang qui représentait la personne du défunt, et sur la tête de qui “ reposaient toutes les actions actives et passives de la succession. Ainsi, le légataire, même universel, était obligé “ de demander la délivrance de son legs aux héritiers légitimes, même collatéraux, qui, avant de consentir à “ son exécution, avaient le droit d’examiner les dispositions d’un testament qui les privait de la totalité de la “ succession.” (1)

492. “ A l’époque où le Code parut, la France était “ donc divisée entre deux usages absolument opposés. “ Dans les pays de droit écrit, c’était en premier ordre la “ volonté de l’homme qui faisait les héritiers ; les institutions d’héritiers étaient le droit commun ; les héritiers “ du sang n’étaient appelés qu’en second ordre, et seulement à défaut d’héritiers testamentaires ; ces derniers “ étaient saisis de plein droit de la succession.”

“ La présence même ou le concours des légitimaires, ne “ faisait point cesser cette saisine : ” (voir M. Bigot de Préameneu, exposé des motifs, p. 303.)

“ Les légitimaires n’avaient à exercer qu’une action en “ partage,” (voir Domat., liv. 3, tit. 4, sec. 3, no. 2, p. 458.)

493. “ Dans les pays de coutumes, au contraire, la loi “ seule faisait les héritiers ; elle n’en connaissait point d’autres que ceux du sang. L’institution d’héritier était pros-

(1) Voir le Nouveau Denisart, vbo. Délivrance, sec. 1, no. 2.

“crite, ou n'avait que la force d'un legs, quand même ce legs eût emporté tous les biens du défunt. Les héritiers du sang étaient seuls saisis, seuls représentants de la personne du défunt. Ainsi, point d'héritiers testamentaires.”

494. “Entre ces deux législations opposées, le code a pris un parti mitoyen qui dérive des principes adoptés sur la disponibilité des biens.” (Voir M. Bigot de Préameneu, *ubi supra*, p. 204.) Cette distinction entre le cas où il y a des héritiers qui ont une réserve et celui où il n'en existe pas, est due à M. Cambacérès. (Voir le Procès-Verbal des Conférences, à la séance du 27 ventôse an XI, tom. II, p. 636.)

“Ce parti mitoyen dont parle Toullier n'a pas été introduit dans ce pays par aucune disposition expresse, et les principes du droit coutumier, en matière de testament, de saisine et de délivrance de legs, continuent de nous régir. Telle était l'opinion d'un avocat distingué, membre de la législature, qui introduisit, il a deux ou trois ans, un projet de loi pour abolir la nécessité de la demande en délivrance de legs, projet de loi qui fut repoussé par une majorité.”

Dans le système des appelants, l'intimé aurait été *saisi de plein droit* au décès du Dr. Blanchet. C'était le système de M. le Juge Pyke, qui a prétendu que les statuts de 1774 et de 1801 étaient censés avoir importé des pays de droit écrit cette saisine légale au profit des légataires en Canada, mais sans importer en même temps certaines formalités qu'il fallait observer dans ces pays de droit écrit, “and this without observance of the forms which by these laws were required in the exercise of that power.” C'est un système bien commode que celui qui, dans le silence de la loi statutaire de votre pays sur la matière, vous permet d'avoir recours aux lois d'un pays étranger pour en emprunter la *saisine* qui y existe, et choisir arbitrairement la partie des lois sur cette saisine, qui vous convient, et re-

jeter de même arbitrairement la partie qui ne vous convient pas. Cela me rappelle la prétention de l'intimé (dans la cause de *Sénécal et Beauregard*) qui contestait l'élection d'un marguillier pour la paroisse de Varennes, et qui, pour soutenir cette contestation, s'appuyait sur certains règlements particuliers à quelques paroisses en France. Il nous proposait d'adopter soit l'un, soit l'autre de ces règlements, mais il ne nous proposait pas de l'adopter en entier. Il voulait que l'on n'adoptât que la partie qui ne répugnât pas au sentiment qu'il avait de sa dignité.

Ainsi, si nous n'avons plus la saisine de la Coutume de Paris, saisine que cette Coutume donnait seulement à l'héritier du sang, nous n'avons pas, non plus, la saisine telle qu'elle avait lieu dans les pays de droit écrit, puisque nous n'en avons importé qu'une partie. Nous avons donc une autre espèce de saisine pour les légataires, fabriquée pour l'occasion.

Si le légataire a été saisi de plein droit au décès du testateur, les héritiers du sang, les appelants, ne l'ont pas été. Ils n'ont pas eu la possession des biens. C'est le légataire qui l'aura eue aux yeux de la loi et vis-à-vis des tiers, car la saisine de l'un exclut celle des autres. Le légataire aura eu la saisine même sans le savoir, s'il ignore ou la mort du testateur, ou l'existence du legs fait en sa faveur. Mais s'il a la saisine, il ne peut être forcé d'accepter la succession ; plusieurs mois s'écoulent ; enfin il renonce au legs. La succession sera-t-elle vacante, ou sera-t-elle dévolue à l'héritier du sang ? Celui-ci n'ayant pas eu la saisine durant l'intervalle qui se sera écoulé depuis le décès du testateur jusqu'à cette renonciation du légataire, s'il vient à recueillir la succession, pourra-t-il profiter de la possession que le légataire aura eue en vertu de sa saisine, pour la joindre soit à celle du testateur, soit à la sienne, afin d'acquérir la prescription et l'invoquer ? ou n'y aura-t-il pas eu interruption de possession quant à cet héritier qui n'aura pas été saisi pendant l'intervalle en question, et par conséquent interruption de prescription ?

“ A l'exemple des contrats d'acquisition ordinaire,” dit *Simonnet*, de la Saisine Héréditaire, p. 7, “ le titre héréditaire est d'abord pour l'ayant-droit une de ces causes privilégiées attributives de la simple saisine de droit dont parle *Klimrath*. Mais, en outre, les formalités de l'adverpissement attributives de la vraie saisine sont suppléées à l'égard de l'héritier par la coutume qui, au moment du décès de son auteur, le répute immédiatement en saisine de tout ce dont le défunt est mort saisi et tenant. Tel est le sens spécial de la règle : *Le mort saisit le vif* : elle constitue l'héritier possesseur de plein droit à l'égard des tiers.”

IV. Utilité de la règle coutumière.

“ L'utilité de cette règle est manifeste, si l'on suppose pour un instant un état du droit dans lequel elle ne soit pas reconnue. Soit l'hypothèse où un tiers appréhende un des effets de la succession dans l'intervalle de temps qui sépare le moment du décès de la prise de possession par l'héritier : quelles seraient les voies de droit ouvertes à ce dernier pour faire cesser l'usurpation ? L'héritier, n'étant pas réputé saisi, n'aura reçu de son auteur qu'un droit au fond, un titre qui lui servira à recouvrer la chose héréditaire, mais sous la condition de prouver que son auteur était propriétaire en vertu d'une de ces causes spéciales attributives de la saisine de droit. A défaut de cette preuve épineuse et souvent difficile à mener à bonne fin, dans les formes si compliquées de l'ancienne procédure, l'héritier sera déchu de tout droit. Cependant son auteur, s'il eût vécu plus longtemps, aurait eu un rôle beaucoup plus favorable :

1o. “ Contre un tiers qui l'aurait violemment dépossédé, le *de cujus* eût été ressaisi indistinctement, en vertu de la maxime : *Spoliatus ante omnia restituendus*. “ De quelque chose que je sois en sesine, et quele sesine que soit, soit bonne ou mauvaise et de quelque temps que che soit, soit grant ou petit, qui m'oste de cele saisine, sans jugement ou sans justiche, je doi estre ressesis avant toute œuvre, si je le requiers.” (*Beaumanoir*, ch. XXXII, p. 170.) Dans

le même cas, le tiers détenteur opposerait à l'héritier qu'il n'a jamais été possesseur, et par conséquent qu'il n'a pas pu être dessaisi ;

20. " Contre toute personne qui l'eût troublé dans la possession dont il jouissait depuis l'an et jour, le *de cujus* aurait recouvré sa saisine par les voies assez simples de la complainte. Mais, dans la même hypothèse, l'héritier sera repoussé par une fin de non-recevoir absolue, tirée de ce que la saisine de son auteur ne lui a point été transmise, comme eût pu l'être un droit de propriété : il ne pourrait donc se pourvoir par voie de complainte, à moins d'avoir possédé lui-même pendant l'an et jour.

" Ainsi, dans ces deux cas, l'héritier aurait moins de droits que son auteur. Au moyen de la règle coutumière, au contraire, si on lui permet de remonter à la possession du défunt saisi et tenant, et de s'en prévaloir, l'héritier sera censé avoir été dépossédé par violence, troublé dans sa possession annale, et par suite dispensé de prouver son droit au fond. ' En titre de succession, l'hoir se peut dire, incontinent après la mort de son prédécesseur, en possession et saisine des biens du trépassé dont il se dit hoir, *quia saisina defuncti descendit in virum*, et si momentanément et avant l'an et jour, ils s'apparent aucuns opposants ou empeschant, iceluy peut contre eulx intenter ledit libel [de complainte], et soi aider de la saisine, à cause de la saisine de son prédécesseur et devancier.' (*Grand coutumier*, II, ch. 21.) "

En voilà assez, ce me semble, pour établir l'utilité de la règle coutumière.

Ce n'est pas la volonté de l'homme qui donne au plus proche parent la qualité d'héritier. C'est la loi elle-même. L'homme, à qui la loi canadienne donne à présent une liberté entière de tester de tous ses biens, peut, en les donnant à un autre qu'à l'héritier du sang, en priver cet héritier. Mais il ne pourra pas lui ôter la qualité d'héritier du

sang. Ce sera au moyen de cette qualité, et de cette qualité seule, qu'il sera admis à attaquer le testament, et à recueillir lui-même la succession, s'il réussit à faire prononcer la nullité du testament. Dira-t-on que de ce qu'il se trouve, au décès du testateur, un légataire universel, l'héritier du sang est sans intérêt vis-à-vis de la succession, qu'il n'est pas *utile* qu'on procède à la vérification du testament, à le faire déclarer valable ou nul, si lui, l'héritier du sang, juge à propos de l'attaquer, comme il a le droit de le faire; droit qu'il tient de la loi? L'exercice de ce droit est fondé sur l'intérêt. C'est pour protéger ce droit et cet intérêt que la saisine lui était donnée par nos lois anciennes, et que ces mêmes lois obligeaient le légataire à lui demander *délivrance*.

Lors de la discussion du nouveau code français, le tribun Siméon disait au Corps Législatif : " La mort, soit naturelle, soit civile, à l'instant où elle frappe définitivement, ouvre donc la succession. Elle l'ouvre au profit des héritiers légitimes ; elle les saisit de plein droit du patrimoine du défunt, sans qu'il soit besoin d'aucune demande de leur part : *utile et belle conception, au moyen de laquelle la propriété ne reste jamais en suspens*, et reçoit, malgré les vicissitudes et l'instabilité de la vie, un caractère d'immutabilité et de perpétuité. L'homme passe, ses biens et ses droits demeurent ; il n'est plus, d'autres lui-mêmes continuent sa possession et ferment subitement le vide qu'il allait laisser." (1).

Tous les parents d'un défunt sont appelés par la loi à lui succéder, les uns en premier lieu, les autres en deuxième lieu, et ainsi de suite, successivement, selon le degré de leur parenté. La *saisine* de la Coutume de Paris profite à tous. Si le premier en degré renonce à la succession, elle sera dévolue au deuxième, au troisième, au quatrième etc., et celui qui la recueillera aura la saisine légale du jour du décès du *de cujus* ; et il recueillera

(1) Fouet, tome 12, p. 226.

du chef du défunt, biens et possession. Il n'y aura pas eu d'interruption. Car la loi l'aura ainsi voulu.

Dans le système contraire, vous accordez la saisine légale au légataire dès l'instant de la mort du testateur. Ce légataire est un étranger. Il ne fait pas acte de légataire ; cependant il a la saisine légale, il possède ainsi six mois, douze mois : au bout de ce temps, il refuse d'accepter le legs, et cesse par conséquent de posséder. Il ne transmet rien à l'héritier du sang, et celui-ci ne peut rien recueillir du chef de ce légataire. Il y aura donc eu interruption, et la propriété du défunt aura donc été tenue en suspens tout le temps qu'aura duré la saisine légale du légataire. Si vous admettez que celui-ci répudiant le legs après douze mois de saisine, l'héritier du sang aura droit de recueillir, ce ne pourra être que du chef du défunt, et alors ferez-vous remonter sa saisine au décès du testateur ? Ne sera-ce pas contredire la règle que vous avez voulu établir que la saisine était dévolue au légataire à l'exclusion de l'héritier du sang ? Vous serez donc obligé d'admettre qu'il y aura eu deux saisines au profit de deux personnes différentes, durant le même espace de temps. Ce sera par fiction, direz-vous peut-être. Où est le texte de loi qui a créé cette fiction ?

M. le Juge Pyke admettait que la règle " le mort saisit le vif etc.," était encore en vigueur en Canada. Il voulait, par induction tirée des statuts de 1774 et de 1801, soustraire à son opération seulement " those cases where a disposal by last will and testament has been made to the entire exclusion of the legal or blood heir." Un testateur peut produire ce résultat par trois moyens : par un legs universel, par des legs à titre universel, et par des legs particuliers. Tous ces légataires, recueillant, quoiqu'à des titres différents, tous les biens de la succession, à l'exclusion de l'héritier du sang, seront-ils *tous* saisis de plein droit des biens composant leurs legs, dès l'instant de la mort du testateur ? Je cherche en vain dans l'opinion de M. le Juge

Pykè quelque chose de précis sur cette question. Il nous laisse complètement dans le vague. Il ne pouvait guères en être autrement, puisque ces statuts de 1774 et de 1801 n'ont aucune disposition sur la saisine. Se contenter de dire que, dans le cas où une personne aura par testament donné tous ses biens au préjudice de son héritier du sang, celui-ci n'aura pas la saisine légale, ce n'est pas résoudre la question. Le légataire à titre universel aura-t-il la saisine ? Le légataire particulier l'aura-t-il aussi, lui ? ou le légataire universel l'aura-t-il seul ? Les deux premiers seront-ils dispensés de demander *délivrance* au dernier ?

Dans l'espèce qui nous occupe, il y a quelques legs particuliers faits au profit d'héritiers du sang ; en seront-ils saisis ? ou bien, seront-ils obligés de demander *délivrance* au légataire universel ? Si je pose toutes ces questions, c'est parce que les statuts de 1774 et de 1801, ne contiennent pas un seul mot sur la saisine. Dans la Coutume de Paris, un texte formel donnait cette saisine. Sous l'empire du code civil, une disposition la donne en termes exprès. Dans l'un et l'autre cas, c'est la loi qui la donne, et non les dispositions ou la volonté de l'homme.

C'est un champ bien vaste que le système des appelants, qui ne s'appuie que sur des inductions, des *suppositions*, nous appelle à parcourir. Nous aurons à en faire l'exploration sans boussole, car les statuts de 1774 et de 1801 nous ont laissés, je ne saurais trop le répéter, sans *régléments* sur la matière. Nous serons donc exposés à nous égarer plus d'une fois. Avant la promulgation de ces statuts, l'institution d'héritier était inconnue en Canada, nous n'avions que des légataires, puisque nous étions régis par le droit coutumier de la France, et non par celui des pays de droit écrit. Aujourd'hui l'on prétend que les nouvelles lois statutaires ont introduit en Canada cette institution d'héritier. C'est vraiment là la prétention des appelants, autrement leur système n'aurait aucune base

quelconque. Cette introduction aurait donc eu lieu, justement parce que ces nouvelles lois ne disent pas un mot de cette institution d'héritier. Il faut avouer que cette prétention présente quelque chose de nouveau en matière de législation. Mais, dit-on, il est maintenant permis à un testateur de donner tous ses biens à un légataire étranger, comme cela se pratiquait en pays de droit écrit. Or, dans ces pays, le légataire, c'est-à-dire *l'héritier institué*, avait la saisine légale ; donc, en Canada, le légataire doit avoir la même saisine. C'est bien, vous soutenez ainsi que ce légataire qui a tous les biens, est un *héritier institué*, puisque, dans votre système, il exclut l'héritier du sang, et que vous lui donnez la saisine dès l'instant de la mort du testateur. Il en était ainsi en pays de droit écrit, dont la législation sur cette matière aurait été, selon M. le Juge Pyke et suivant vous, introduite en Canada, peut-être depuis le statut de 1774, mais, à coup sûr, depuis le statut de 1801. Je comprends cette manière de raisonner, dont on voudra bien me permettre de signaler l'une des conséquences. Ce raisonnement conduit nécessairement à la conclusion que, quand dans un testament il n'y aura pas de légataire universel, c'est-à-dire, un *héritier institué*, ou si cette institution est nulle, tous les legs portés dans ce testament deviendront caducs, à moins qu'il ne renferme la clause codicillaire. Car telle était, sur le sujet, la législation des pays de droit écrit. En parlant de cette législation, Troplong, *Droit civil Français*, t. 5, no. 486, dit : " On ne pouvait même, dans l'ancien droit, faire des legs sans instituer un héritier. Si l'institution manquait, si elle était nulle, les legs devenaient caducs ; l'héritier légitime n'était point obligé de les acquitter. Le testateur ne pouvait commander qu'à l'héritier qu'il instituait, et non pas à l'héritier du sang, qui ne tenait son droit que de la loi." (1)

Si le système des appelants doit prévaloir aujourd'hui,

(1) Voir, Rép. de Guyot, au mot "Institution," pp. 298 et 309, où sont cités l'ord. de 1735, art. 56, et l'opinion de Furgole.

ce sera la condamnation d'un grand nombre de jugements qui ont admis la validité de legs contenus dans des testaments qui ne portaient pas de legs universels, c'est-à-dire, d'institutions d'héritier.

Du moment qu'il vous sera concédé que le légataire universel a la saisine légale, et que par conséquent il exclut l'héritier du sang, il vous sera par cela même concédé que ce légataire est un héritier institué, qui représente la personne du défunt.

Quand on pose un principe, il faut être prêt à en subir toutes les conséquences. Il doit y avoir un héritier ; si ce n'est pas l'héritier du sang, ce sera un héritier institué, celui des parties de la France, qui étaient autrefois régies par le droit écrit, sur lequel vous vous fondez. " L'héritier institué," dit Toullier, au no. déjà cité, " représentait la personne du défunt : il prenait dans la société la place que celui-ci laissait vacante ; il succédait à ses droits, à ses charges, à ses engagements ; en un mot, il le *représentait*." Pour être logique, vous devez nécessairement admettre que votre système conduit à ce résultat. Vous ne pouvez pas dire, comme le contestant de Varennes, " prenez la partie qui me plaît, et rejetez celle qui ne me plaît pas."

Il y avait quelques coutumes, en France, qui avaient conservé l'usage et l'effet des institutions testamentaires. En cela, leur droit était le même que celui des pays de droit écrit. M. le Juge Pyke les a citées, en transcrivant le passage du Rép. de Guyot, qui rapporte les textes de ces coutumes. Il en a fait le point de départ et la base de son argumentation. Dans ces textes, l'on trouve les mots " héritier testamentaire," ou " héritier institué par testament." Et c'était à cet héritier que la saisine était donnée, et non pas à celui qui n'avait d'autre qualité que celle de légataire. Vous ne trouverez nulle part, dans les deux statuts que vous invoquez, le mot héritier testamentaire etc. Pour soutenir le système des appelants, il faut que l'imagination supplée à cette omission, et c'est ce que l'on a tenté de faire.

Dans les pays de droit écrit, et les quelques coutumes où ce droit était admis, la loi donnait bien la saisine à l'héritier institué ; mais, si je ne me trompe, les incidents de cette saisine n'étaient pas uniformes. Ils étaient, dans plusieurs cas, soumis à des règlements différents. Lesquels adopterez-vous ? et si vous faites un choix, ne sera-ce pas un choix arbitraire, que le législateur seul, et non le juge, a le droit de faire ?

Il me sera permis de citer ici ce que disait l'un des honorables membres de cette Cour, M. le Juge Mondelet, lorsqu'il siégeait dans la Cour de première instance, à l'occasion du procès de *Stuart* contre *Bowman*. (1) Il s'agissait là de la question de savoir si la proclamation de 1763, avait introduit en Canada les lois anglaises, *the laws of England*, mots qui étaient (qu'on le remarque bien,) employés dans cette proclamation. Il faut avouer que ces mots étaient employés d'une manière bien générale et bien vague, mais toujours est-il qu'ils y étaient ; et évidemment ils exprimaient une intention sur laquelle il n'y avait pas à se méprendre. " Il n'est pas permis," dit le savant juge, " en présence d'une phraséologie aussi générale, " aussi peu tranchée que celle-là, de violer toutes les " règles de la logique, de la raison, de la justice et de " la loi, et assurer, comme on le fait, que les termes sont " une déclaration formelle de la part du Roi, que les lois " anglaises devenaient et seraient désormais les lois du " Canada."

La logique m'en fait dire autant sur la question qui nous occupe dans ce moment.

Je ne puis découvrir, dans les statuts de 1774 et de 1801, rien qui indique une institution d'héritier, ou un héritier testamentaire, puisque ces mots ne s'y trouvent pas, ni rien qui annonce que la *saisine légale* ait été transférée de l'héritier du sang au légataire, même universel, parce que

(1) 2 Déc. B. C. 369.

ces lois ne contiennent aucune disposition concernant la *saisine*. Le législateur n'ayant pas fait connaître son intention à cet égard, j'en conclus qu'il a voulu laisser les choses dans l'état où elles étaient, et qu'il est censé avoir dit aux testateurs : Vous pourrez léguer tous vos biens, mais vous ne ferez que des légataires, vous ne pouvez pas faire des héritiers : car, comme disent d'anciens auteurs, " Dieu seul, et non la volonté de l'homme, peut faire des héritiers." (Toullier, déjà cité, no. 487).

MONDELET, Juge.—Appel d'un jugement de la Cour Supérieure du 6 décembre, 1859, ordonnant, à la poursuite de l'intimé, légataire universel de feu Jean-Baptiste Blanchet, écuier, en son vivant médecin de Québec, ordonnant dis-je, l'exécution du testament du dit Jean-Baptiste Blanchet, du 27 février, 1854, et de son codicile du 18 avril, 1857, expliquant ce testament.

La question à juger ici est celle-ci ; l'intimé qui est légataire universel, qui admet par des réponses aux interrogatoires sur faits et articles être en possession de la succession, a-t-il, d'après notre droit, une action en délivrance de legs contre les frères du défunt ? Cette action était-elle nécessaire et la Cour de première instance a-t-elle bien jugé en l'accueillant ?

L'article 318 de la Coutume de Paris, ne peut plus être regardé comme partie de droit du Bas-Canada, depuis la passation du statut provincial 41, George III, chap 4, qui explique l'acte impérial de 1774.

Avant ce statut, l'on ne pouvait disposer, indéfiniment, de tous ses biens ; depuis sa promulgation l'on institue l'héritier et le légataire comme on l'entend. La maxime *le mort saisit le vif* n'a plus nécessairement son effet ; dans le cas actuel, elle n'a, elle ne peut avoir, aucune application, puisque le Dr. Blanchet a fait de l'intimé son légataire universel.

Il est certain qu'en France, ou plutôt en pays coutumier, la raison, qui faisait qu'on demandait la délivrance de legs

à l'héritier, est qu'il y avait nécessairement un héritier, et, il va sans dire, la demande en délivrance de legs était indispensable.

Ainsi donc, toutes les autorités des écrivains sous l'empire de l'ancien droit sont sans application quelconque, et le travail du Juge-en-Chef, fort bon pour prouver ce que personne ne nie, c'est-à-dire, qu'avant le statut de 1774 et celui de 1801, en Canada et en France, dans tous les pays coutumiers, la délivrance de legs était regardée comme nécessaire, est ici sans portée aucune.

Il n'est pas hors de propos de remarquer ici, que dans le ressort des parlements de droit écrit, où l'institution d'héritier avait lieu, la demande en délivrance de legs n'existait pas, V. G. Dans le Parlement de Bordeaux.

D'ailleurs, Toullier qu'a cité l'intimé à la page 5, de son *factum* dit : (1)

“ A l'époque où le code parut, la France était donc divisée entre deux usages absolument opposés.

“ Dans les pays de droit écrit, c'était en premier ordre la volonté de l'homme qui faisait les héritiers ; les institutions d'héritiers étaient le droit commun ; les héritiers du sang n'étaient appelés qu'en second ordre, et seulement à défaut d'héritiers testamentaires ; ces derniers étaient saisis de plein droit de la succession.”

Je ne puis guère comprendre quelle a pu être la raison qui a porté le savant conseil de l'intimé à faire cette citation, pas plus que je puis m'expliquer pourquoi les appelants ne l'ont pas imaginée.

Au reste, cette citation n'était pas nécessaire.

Si on s'arrête un instant à la partie pratique de cette singulière et anormale cérémonie de demander la délivrance de legs à un individu ou à des individus qui ne

(1) 5^e Toullier, no. 492.

sont pas héritiers, l'on se trouve en regard d'un procédé non seulement ridicule, mais insultant à celui ou ceux auxquels on donne la qualité dérisoire d'héritiers.

Vous, un tel, vous avez été déshérité, vous n'avez rien de la succession en votre possession, vous n'êtes héritier ni par la loi, ni en vertu de la maxime *le mort saisit le vif*, ni en vertu du testament, et bien, moi qui par le testament suis le légataire universel, moi qui suis en possession de la succession, je viens vous saluer, et vous féliciter sur votre bonne fortune et sur les compliments tout à fait flatteurs que vous adresse votre défunt parent, pour appuyer, l'expression de sa volonté, qui vous prive de la succession, et moi qui suis en possession de cette succession, je viens vous la demander à vous qui n'en avez pas une seule particule.

Et non content de cela, je demande sérieusement à la Cour d'accorder sa sanction solennelle à cette plaisante, anormale, bizarre, ridicule cérémonie.

Ce jugement dépasse d'ailleurs les conclusions de la demande, qui sont purement et simplement, qu'il soit dit, déclaré et adjugé, que le dit testament sera exécuté suivant sa forme et teneur ; en conséquence, qu'il sera fait délivrance au dit Hilarion Blanchet, le demandeur, du legs universel y porté en sa faveur.

Ce jugement porte : " De plus, ordonne qu'à payer et vider leurs mains en les siennes, des dits fruits et intérêts, seront contraints les locataires et fermiers des immeubles, les débiteurs des rentes et sommes mobilières produisant intérêts et composant le dit legs, quoi faisant déchargés."

Condamnation bien inutile, vague et inexécutable dans tous les cas, et hors d'œuvre, sans effet légal, non demandée et qui excédant les conclusions de la demande, rend nécessairement nulle cette partie du jugement.

On a parlé de jurisprudence, je n'en dis rien, par la raison toute simple qu'il n'existe aucune jurisprudence sur cette question dans le Bas-Canada. Inutile pour moi d'ajouter, que dans le cas même où il y en aurait une, je ne m'y conformerais pas, si elle avait consacré l'erreur que la délivrance de legs est nécessaire.

J'opine donc pour l'infirmité du jugement dont est appel, et suis d'avis que l'action de l'intimé devrait être déboutée.

Quant à la partie de l'action qui a pour objet de faire déclarer la validité ou reconnaissance du testament, ou plutôt ce qui en est dit dans la conclusion de la déclaration, elle ne signifie rien, c'est un hors d'œuvre sans portée, l'action n'est qu'en délivrance de legs.

BADGLEY, Justice.—This is an action between the collateral relations of the deceased testator, the plaintiff being his nephew and the defendants his brothers. The declaration sets out in substance that being the universal legatee under his uncle, the testator's will, the plaintiff claims from the defendants, the testator's heirs at law, a delivery to him by them of the testator's estate so bequeathed to him. The facts of record shew that at the decease of the testator, the plaintiff was living with him, and upon his death took and has since retained possession of his entire estate, and that the defendants in no manner or way ever had possession of any part of it. This action *en délivrance de legs* would seem under these circumstances to be useless, inasmuch as it could lead to no practical result in fact ; but it has again raised the long debated and legally interesting question of the *saisine* under the article of the custom "*le mort saisit le vif son hoir plus proche et habile à lui succéder.*" The point in litigation, therefore, is the question of the *délivrance de legs*, consequent upon the hereditary *saisine* of the *héritier du sang* to the exclusion of all legatees or others claiming under the will. It must be premised that in law both plaintiff and defendants, under the 339 article of the

Custom are in concurrence in the estate of the testator. To ascertain the right of the plaintiff to urge this pretension of *saisine*, it is proper to know what it is its effect, and to whom accorded by law. "C'est une fiction de la loi qui suppose que le *de cuius*, à l'article de la mort, a remis à son successible, la masse héréditaire. Tel est le sens de la maxime: le mort saisit le vif.... La saisine, dans son acception la plus générale, est le caractère légal sous lequel se manifeste la possession à l'encontre des tiers (Simonnet, Théorie de la Saisine, pp. 4, 5). Now what is transmitted? "Le patrimoine du défunt," the "ensemble de ses droits actifs et passifs, universalité juridique qui passe au successeur universel avec ses charges; c'est-à-dire que toutes les obligations qui pesaient sur les biens en sont inséparables: juridiquement les dettes.... les dispositions de dernière volonté, dont le caractère général est qu'elles sont autant de dettes imposées par le défunt à son successeur universel pour le temps où il n'existera plus." (Loc. cit., p. 2, Pothier, Success., pp. 129, 138, in 4.) It is therefore manifest that the *saisine*, as such, is a right and privilege accorded by the law to the nearest blood relation, it is only a right of possession, and as a possession it subjects this possessor to the debts of the deceased. "Pothier, Succession pp. 129, 138, répute pour la part dont il est héritier propriétaire de tout ce dont le défunt était propriétaire, créancier de tout ce dont il était créancier, débiteur de tout ce dont il était débiteur, quand même les dettes exèdèraient de beaucoup les biens de la succession, et possesseur sans aucune appréhension de fait de sa part." "La saisine a même toujours conservé ce caractère particulier qu'elle emporte l'obligation aux dettes, non pas en vertu de ce principe, *non sunt bona nisi deducto aere alieno*; mais parce que le saisi est garant et responsable." (Pothier, Succ. ch. 3, sec. 2—Code Civil, art. 724.) It is in fact a mere legal title, exclusive in its nature and effect in favour of the nearest blood heir of the deceased, which "au moment du décès de son auteur répute le successeur, immédiatement en

"saisine de tout ce dont le défunt est mort saisi et tenant.
 "Tel est le sens spéciale de la règle, le mort saisit etc.,
 "elle constitue l'héritier possesseur de plein droit à l'égard des tiers," and *successivement* gives to him the various possessory actions, such as *réintégrande* and others, for obtaining possession of the estate, because, in effect, "considéré dans son objet," it is "la continuation de la saisine du défunt en celle de ses successeurs; elle se continue donc avec les mêmes qualités, sauf les droits d'autrui en toute chose." 13 Démolombe, p. 198, no. 139.
 "Et ceci prouve bien que la saisine dans son acception spéciale, diffère de la propriété, qu'elle a trait surtout à la possession," and at no. 25, he calls *saisine* "une possession revêtue d'une certaine qualité de la possession qui la rend susceptible d'effets civils." The chief and real interest then of this nearest heir *ou successeur*, can only be *un titre pour acquérir et recouvrer la possession*. The authorities of law establish this point. "La saisine héréditaire n'étant qu'un droit de possession qui n'entraînait pas avec lui la dévolution proprement dite des droits du *de cuius*, en la personne de son héritier, en sorte que dans cet état du droit, ce serait confondre tous les rapports que de définir la saisine héréditaire, la transmission immédiate et instantanée de tous les droits du défunt à son héritier vivant." In universal successions, it is established as law, that "la saisine a pour objet à la fois l'ensemble des biens considérés comme universalité, et chacun des biens et des droits qui la composent individuellement: elle se trouve garantie au profit du saisi, à ce double point de vue." (1)
 Now although the law has from a motive of public policy cast the *saisine* upon the nearest blood heir of a deceased, to prevent vacancies in estates, it has done so for an important purpose, namely, for his protection chiefly as head of the family, and subsidiarily as representing the estate, to enable him to exercise his rights of inheritance as against a testator, not as against a legatee. "On

(1) Simonnet, p. 115.

" n'a pas droit de dire contre un fils, *filius ergo hæres*,
 " ni conclure qu'il est héritier parce qu'il n'a pas renoncé."
 The maxim of law, *n'est héritier qui ne veut*, is as posi-
 tive and stringent in its application and effect as that other,
le mort saisit le vif, and in this country it may be said
 to be more useful and beneficial. " Les textes de l'an-
 " cienne jurisprudence accordaient une grande portée à
 " cette maxime protectrice, en conséquence de laquelle le
 " successible en ligne directe ou collatérale qui s'était
 " abstenu de la succession y demeurerait étranger." (LeBrun,
 Succes., liv. 3, ch. 1, no. 37.) " C'est ici que vient une autre
 " maxime, *il ne se porte héritier qui ne veut* : laquelle si-
 " gnifie deux choses. 1o. Que dans notre droit nous n'avons
 " pas d'héritier nécessaire, précisément déclaré par l'art.
 " 316 de la Coutume de Paris etc. 2o. Il ne faut point
 " d'acte de renonciation pour n'être point héritier : mais il
 " suffit de n'avoir pas accepté précisément, et de n'avoir
 " pas fait acte d'héritier, ce qui a lieu tant en ligne di-
 " recte que collatérale, car l'on n'a pas droit de dire
 " contre un fils *filius ergo hæres*, ni de conclure qu'il est
 " héritier parce qu'il n'a pas renoncé : Ainsi jugé par
 " arrêt de la 5me Chambre des Enquêtes du 8 février,
 " 1590, Pothier, Succes., ch. 3, sect. 2." Demolombe com-
 bats these opinions, but admits that *la même thèse* was sou-
 tenue dans notre ancien droit français, was maintained in the
 Roman law, and established sous l'empire de notre code. He
 asserts them all to have been wrong. Moreover the saisine it-
 self lapses by non-user for a year. "*La saisine se perd et s'ac-*
 "*quiert par an et jour : La saisine se perd en principe par*
 "*le laps d'une année ;* (1) c'est-à-dire, que l'héritier qui a
 " laissé occuper sa chose par un étranger, et qui n'a pas
 " fait valoir sa qualité dans l'année de la rupture de sa
 " saisine, en est juridiquement déchu, et ne peut plus y
 " rentrer par la voie possessoire ordinairement employée
 " pour le recouvrement de la possession.... Il a donc
 " perdu la vraie saisine de l'hérédité, et avec elle la

(1) Simonnet, p. 278 :—LeBrun, Succes., liv. 3, ch. 1, no. 35.

"présomption qui le faisait considérer comme accep-
 "tant après trente ans de silence." (1) The simple legal
 result is that the *héritier* is not necessarily bound, and
 cannot be compelled, to act upon the *saisine*: it is his pri-
 vilege, *il a la faculté*, to do so, but the legatees or other
 claimants under a will cannot force or compel him to act
 on the *saisine*. The authorities cited by the respondent,
 and the arguments urged in his factum, are strongly in favour
 of the right of the appellants, as nearest blood heirs of the
 testator, to exercise the *saisine* and to urge its legal effects
 and consequences if they so desired, but have no power
 against them, refusing to use the *saisine*, refusing in fact
 to demand from the respondent what they have not, and
 what in fact he has in his own possession, namely, the
 entire estate of the testator, and refusing to adopt the
 obligation that the respondent desires to cast upon
 them by this action *en délivrance de legs*, namely for
 his benefit to make *un acte d'héritier*, to acknowledge
 in effect thereby the validity of the will, which on the
 contrary they deny, and finally thereby by their own
 act to invest the respondent, the universal legatee, with the
 entire estate which he claims under a will which they
 assert was fabricated by himself, and improperly executed
 in his favour. This action is a clever expedient to secure
 a judicial sanction to the will, as against the appellants,
 and not merely to secure the fictitious right of *délivrance*,
de legs, of what the respondent is already in possession,
 and the obtaining of which right can be of no real use to him
 when obtained; for ought that appears in the record of this
 cause such a *délivrance* cannot be rendered effectual from any
saisine that could even be claimed by the appellants so long
 after the testator's decease; the testator died 23rd April,
 1857, the pleas of the appellants were not filed until long
 after the year and day thereafter, and they thereby deny
 that they were *saisis* or had acted upon the legal *saisine*;
 for the reasons above stated the action should not have

(3) Simonnet, p. 279;—LeBrun, Succ., loc. cit.

been maintained. The arguments of counsel have however gone beyond these points and reached to matters of great legal importance, and hence it is necessary to test the present effect of the *saisine* in this Province, as well under the old law, as under its legal modifications by our statutory provisions and by our jurisprudence. Now bearing in mind that the right of *saisine* is *protective* of the heir against a testator, and not against a legatee, that, in this case, there are no *légitimaires* nor *réserveataires*, that the contesting parties are collateral heirs, and that there are no *propres* in litigation, it will be found that under the law, the *saisine* of the *héritier* is not, *de droit*, absolute and inevitable in him or in his favour, and that it is subject to be controlled and set aside by that of others having equal if not better right than his. By the old law which maintained the *légitime* and *les réserves coutumières*, the *légitimaire* and the *lignager* became vested with the *saisine successivement*, as their respective titles were firmly established and maintained by the *coutume*; the owner of an estate might alienate it, but the *lignager* had the right of redemption: the testator might devise all his property, but the law cut down and restricted the general bequest in favour of *un étranger* to one fifth of the *propres* only. The *qualités* and *droits* of these parties were therefore notorious: “La mort du *de cujus* n’était donc pas, à
 “ proprement parler, attributive d’un droit nouveau: c’était
 “ la réalisation de la condition suspensive, sous laquelle
 “ le successible était propriétaire du patrimoine, en qualité
 “ d’héritier présomptif... Dans la transmission héréditaire,
 “ la qualité de présomptif héritier préexistante se réalise,
 “ au moment du décès, en la personne de l’habile à succé-
 “ der. Il n’y a donc ni vacance, ni même, *in intellectu*, des-
 “ saisissement du mort et ensaisinement de l’ayant droit;
 “ ce dernier continue une saisine primitivement renfermée
 “ dans sa qualité de lignager, plutôt qu’il n’acquiert à nou-
 “ veau. ‘ Sitôt que l’hoir est né, nous croyons que le droit
 “ de père et de la mère lui sont descendus temporellement,

" et par le baptême, les héritages du Paradis spirituelle-
 " ment ' comme dit Beaumanoir, " et tels sont les droits de
 " l'héritier du sang et de Dieu, que la volonté de l'homme
 " ne pouvait altérer." (Simonnet p. 110) The effect of
 the reservation of the four fifths of the *propres* from the ge-
 neral bequest, necessarily resulted in the *saisine* of the ac-
 tual property in possession of the *réservataires*, who like the
légitimaires were proprietors *par indivis* of the estate :
 " comme ils doivent recueillir certainement une portion no-
 " table du patrimoine, cette portion entraînait le reste de la
 " succession dans la saisine héréditaire, et le légataire,
 " quelque fût l'étendue de son titre, n'avait que des droits
 " secondaires et devait se pourvoir par action pour obtenir
 " la délivrance." " Plus, l'héritier des quatre cinquièmes à
 " titre de réserve, était saisi de toute l'hérédité contre le
 " légataire qui devait se pourvoir par droit d'action." And
 in the same manner as to the *légitimaire*. These references
 are made to shew that even taking the *saisine* as matter of
droit public in principle, its effect by the old law was pro-
 prietary, and practically brought it to those whose titles as
 proprietors *par indivis*, by the law, gave them in effect the
 possession of the whole estate under a first and primary
 title, and who could not from any secondary title derived
 from last will be deprived of their primitive rights. It rested
 upon these proprietary rights as family property, and where
 the *légitime* and the *réserves* in fact did not exist, this
 right of *saisine* which was attached to these proprietors
 because they were the proprietary representatives of the
 property held by the deceased, were obviously futile forms
 in all cases in which no partition of property was needed.
 This was the legal effect in Customary France where *la*
forme et la fiction de la saisine et de la désaisine étaient du
même instant. In the civil law provinces of France the *héri-*
tier institué was also the one upon whom the *saisine* de-
 volved. " Dans ces provinces l'héritier institué était
 " subrogé au lieu de l'héritier *ab intestat*, et le testament
 " était une loi particulière substituée à la règle coutu-

"mière. Des lors, plus de différence entre les deux qua-
 "lités, et l'héritier institué était tenu des dettes indéfini-
 "ment comme l'héritier coutumier; comme ce deraier il
 "devait donc avoir la saisine exclusivement. Aussi, les
 "droits des légitimaires et des réservataires, qui, dans les
 "principes coutumiers, entraînaient à eux la saisine de la
 "succession, parce qu'ils constituaient essentiellement des
 "droits héréditaires, n'avaient plus le même caractère dans
 "les provinces du droit écrit," (1) Yet even in the civil law
 provinces, a *portion* of the estate was by the will given to
 the *héritier institué*, and was essential to constitute him
 such instituted heir, thereby making him in effect a pro-
 prietor *par indivis* of the whole estate. An important
 principle may be gathered from these old French systems,
 "la successibilité étant un titre universel, la saisine qui
 "y est attachée a le même caractère et la même étendue :
 "la masse de la succession n'est diminuée que par le
 "concours du légataire universel qui demande la déli-
 "vrance de la quotité disponible ; la saisine du réserva-
 "taire embrasse d'abord toute l'hérédité, et, à ce point de
 "vue, l'on peut dire que l'institution d'héritier ne fait qu'un
 "légataire. Elle n'a pour objet, en effet, qu'un élément
 "flottant, dépendant de la volonté du testateur, au lieu que
 "la réserve forme un élément stable, inaltérable dans le
 "patrimoine, qui entraîne la quotité disponible dans la
 "saisine du réservataire, sauf la demande en délivrance
 "du légataire universel. A défaut de réservataire, il
 "n'y a plus de réserve au profit du lignage, comme en
 "droit coutumier ; la volonté du testateur est sans limites :
 "et la saisine légitime n'a plus un élément invariable sur
 "lequel elle repose. Elle est donc acquise à l'héritier ins-
 "titué, qui recueille toute la succession." (2) Now this is
 also the rule of the Modern French law : the code distin-
 guishes the case of a *réservataire héritier*, and an *héritier*
institué. By the 913 art. of the code. "Les libéralités soit
 "par actes entre-vifs, soit par testament ne pourront exéder

(1) Simonnet, p. 145.

(2) Simonnet, p. 263.

" la moitié des biens du disposant," if only one legal child,
 the third if two children, the fourth if three or more
 children : these portions reserved for these heirs are
 known, " sous le nom de réserve légale, affectées aux héri-
 " tiers etc. Les collatéraux sans exception des frères et
 " des sœurs n'ont point de réserve. 5 Toullier, no. 112."
 so " En Pays Coutumier, les frères n'ont de légitime."
 " Lacombe, Rec. de Jurisp. vbo. Légitime, p. 391."
 " Ainsi le Code Civil s'accorde avec le droit coutumier
 " pour attribuer la possession provisionnelle comme effet
 " de la saisine héréditaire au titre le plus favorable," and
 where there was no *réserve*, then the *héritier institué* was
 preferred because the title by the will was the first and last,
 and there was no partition. " Mais pour ceux qui n'ont pas
 " de réserve la saisine disparaît devant un legs universel.
 " C'est le légataire qui est saisi de droit, par l'effet du tes-
 " tament, et les parents qu'il exclud doivent l'attaquer s'ils
 " prétendent que son titre est faux ou nul," Vazeille, Dis.
 Succ. 2, tom. p. 12, so also 12 ; Demolombe, pp. 104, 5,
 who says that the code " s'est attaché à la vérité des faits,
 " et que tout en n'appelant pas du nom d'héritiers les lég-
 " taires universels etc., il a reconnu en eux des successeurs,
 " *in universum jus defuncti*, et qu'il les a traité, en consé-
 " quence, sous beaucoup de rapports, comme s'ils étaient des
 " héritiers *loco hæredum* : L'art. 1006 nous en fournit sur-
 " tout la preuve la plus frappante, car il accorde la saisine
 " au légataire universel à l'exclusion de l'héritier légitime
 " qui se trouve ainsi complètement supplanté etc., et que
 " manque-t-il alors à ce légataire universel pour être de
 " tout point, un héritier institué ? que lui manque-t-il, si ce
 " n'est seulement ce nom, qu'on ne lui donne pas ?" 9 Du-
 ranton, no. 177. " L'ord. de 1735 avait maintenu les distinc-
 " tions qui existaient à ce sujet entre les pays de coutume et
 " ceux de droit écrit, et le code civil, tout en établissant une
 " législation uniforme, a laissé à chacun la faculté de dis-
 " poser sous la dénomination qui lui conviendrait, et qui
 " serait propre à manifester sa volonté. Mais il veut cepen-
 " dant que le légataire universel soit saisi de plein droit,

" sans être tenu de demander la délivrance, dans le cas où
 " le testateur ne laisse pas d'héritiers au profit desquels
 " la loi réserve une quotité des biens." What then is
 the legal position of this case under our existing law and
 jurisprudence, and the statutory enactments in force ? The
 latter have not only enlarged the powers of devisors, but, as
 it has been judiciously remarked by our Supreme Court of
 appeals in England, they have made a new direct law upon
 the subject, and for the very purpose of extending the capa-
 cities and powers of devisees. They have taken away the
 restrictive *légitime* and *réserves*, and left our law very much
 in the condition of that of the civil law provinces of old
 France, and in that of the present law of France under the
 Code Civil, in which in either case the *saisine* is accorded,
 in the former to the *héritier institué*, in fact to a legatee,
 and in the latter to the universal legatee under the will
 where there is no *réserve* or no *héritier ayant droit à réserve* ;
 as Simonnet correctly observes, the law allows the testator
de faire un héritier par testament, and gives the preference
 to him over the *héritier successible* who comes from nature
 and Baptism. This distinction between the "successibles
 " *saisis* et non *saisis* n'a d'autre effet que de refuser aux
 " successibles non *saisis* le bénéfice d'une présomption et
 " des garanties en quelque sorte provisoires qui y sont at-
 " tachées. Ainsi, toute personne appelée par la loi, ou par
 " la volonté du *de cuius*, à recueillir toute ou partie d'un
 " patrimoine en qualité d'héritier, de légataire à titre uni-
 " versel etc., en acquiert de plein droit la propriété dès l'ins-
 " tant du décès du *de cuius*. Ainsi, l'obligation de de-
 " mander la délivrance imposée à quelques uns de ces
 " ayants droit ne forme point une condition suspensive, à
 " l'accomplissement de laquelle soit subordonnée l'acqui-
 " sition de leur droit de propriété." Difficulties have al-
 ways been created without necessity from the continued
 common use of old legal terms and expressions, when,
 from the disuse of the idea or object they were meant
 to convey or explain, or by authorized changes in the

idea or object, the terms and expressions themselves have nothing to rest upon. What effect would our statutory legislation in this matter have had in customary France? The *légitime* and *réserves* would have been abolished and no longer known, and with them would have gone the necessity of a *saisine* in the *héritier successible*. No successible expropriator or proprietor *par indivis* of the estate could have existed with the universal legatee. The latter by force of law, and of his subjection to the payment of the debts of the estate, would alone have been entitled to the so called *saisine*, and the *héritier successible* being without this only interest for having *saisine*, could not prevent the universal legatee or the *héritier institué* from having immediate and actual possession. Under that modified law, the appellants could never have claimed *saisine*, and, therefore, could never have been compelled to give a *délivrance* of what by law they could have had no possession, either actually or fictitiously, or even have had a right to claim in either way. But it has been observed, that the *droit de saisine* is not in the *héritier successible* alone. Simonnet states the law, "les difficultés qui peuvent s'élever au sujet de la saisine ont toujours pour origine un conflit entre deux personnes qui prétendent, chacune de son côté, être exclusivement maintenues ou réintégrées dans la possession, sans préjudice de la propriété. On a voulu faire de la saisine, le droit d'hérédité lui-même, l'attacher à la qualité d'héritier comme un attribut inséparable, etc., on y a mis le germe de difficultés inextricables." He then affirms, that the *saisine* is exclusively *attribuée à la personne seule qui a spécialement le droit de la contester à toutes personnes indifféremment*. Thus the *héritier successible* could not interfere with the *saisine* of the *exécuteur testamentaire*, even under his short lived powers under the customary law. He could only get rid of the executor by handing to him the means of relieving him from his testamentary duty and charge, but he could not interfere with his *saisine* as executor which was absolute and legal,

and to that extent preferable to any through which he might claim. "L'esprit du droit coutumier sur la saisine se révèle dans l'application qu'on fit à l'exécution testamentaire, à savoir de son but et de son objet. Le testateur pouvait confier l'exécution de son testament à une personne de son choix, et lui confier la saisine du mobilier héréditaire pendant l'an et jour, à compter de son décès ; en conséquence des devoirs et droits y attachés, la saisine de l'exécuteur testamentaire se trouvait opposée à celle de l'héritier dans l'intérêt des tiers.... L'héritier ne pouvait donc, à défaut de la volonté expresse du testateur, faire cesser cette saisine en offrant à l'exécuteur une somme suffisante pour le paiement des legs. La coutume, en donnant à ce dernier, comme un dépôt, la saisine des meubles en général, avait prévu que les créanciers auraient la faculté d'arrêter le mobilier avant la délivrance des legs : dans cette position, si l'exécuteur testamentaire avait dû se contenter d'une somme déterminée, la moindre créance inconnue à laquelle il aurait fallu satisfaire eût fait brèche à la suffisance. Du reste, la plupart des coutumes limitaient cette saisine au mobilier ; quelques-uns seulement l'étendaient de plein droit aux acquets, ou même subsidiairement sur les propres." (1) So it was under the Custom of Paris : Nay, more, the *saisine* was always an obnoxious usage before these *coutumes* *n'eussent fait de cet usage une institution positive, et n'eussent attribué la saisine de plein droit à l'exécuteur testamentaire*, attempts were made *d'enlever la saisine légale aux héritiers*." (2) Again "La saisine était accordée à l'exécuteur testamentaire contre l'héritier en faveur des légataires," (p. 138) but only in the interest and within the limits of his mandate, and this rule of customary France applied also to the *héritier institué* in the Civil Law provinces, where the "*héritier institué* est subrogé au lieu de l'héritier *ab intestat*, et le testament était une loi particulière substituée à la règle coutumière.

(1) Simonnet, pp. 135, 136 :—*Revue de Leg.*, t. 30, p. 61.

(2) Simonnet, p. 136 :—See Laurière, art. 297 :—2 *Gr. Cout.*, ch. 2, p. 140.

" Dès lors plus de différence entre les deux qualités, et
 " l'héritier institué était tenu des dettes indéfiniment
 " comme l'héritier coutumier : comme ce dernier il devait
 " donc avoir la saisine exclusivement," because, " les
 " droits des légitimaires et des réservataires qui, dans les
 " principes coutumiers, entraînaient à eux la saisine de la
 " succession, parcequ'ils constituaient essentiellement des
 " droits héréditaires, n'avaient plus le même caractère
 " dans les provinces du droit écrit." Here in this country
 all the rights of the testamentary executor are recognized
 and established to the same extent and degree, as in cus-
 tomary France, he has *la première saisine des meubles*, hence
 in both, " il en résulte que l'héritier ne peut former com-
 " plainte pour l'universalité des meubles, attribuée pendant
 " l'an et jour à l'exécuteur, mais en pratique nous tenons
 " bien communément que l'exécuteur peut former com-
 " plainte, pour ravoir des meubles. Vainement l'héritier
 " voudrait recouvrer la saisine des meubles dont le légataire
 " à reçu délivrance de l'exécuteur : Car, dit l'auteur du
 " Grand Coutumier, deux personnes, chacune pour le tout,
 " ne peuvent être saisie d'une chose universelle." (1) This is
 also specially acknowledged in the Code Civil, in which, to
 obviate the contention between the *héritier* and the executor,
 because the *saisine* of the latter *gêne en effet l'administra-*
tion des héritiers, the *héritiers* are authorized to pay him a
 certain sum of money to relieve him from his legal res-
 ponsibilities, and at the same time to deprive him of his
 powers under the will, his powers extending to the rightful
 " possession du mobilier, le droit de toucher les capitaux
 " héréditaires, exercer les actions mobilières relatives aux
 " biens de la succession, recevoir les actions du légataire
 " et administrer le mobilier. Ces pouvoirs passent, avec la
 " saisine, à l'exécuteur." (p. 348). Modern French Jurists
 have reasoned out the same result as has been established
 by our provincial jurisprudence, as to the term and extent
 of the executors' powers. One or two citations must suffice.

(1) *Simonne*, pp. 203, 4.

§ Duranton, No. 400, considers that the *saisine annale* of the law, takes effect only when the testator "ne s'est pas expliqué sur la durée qu'elle aurait" or has himself limited the year. "Mais que si, dans la prévoyance que l'exécution de ses dispositions pourrait éprouver quelque difficulté et quelques lenteurs, ou quand il fait des legs à terme dont l'échéance s'étendra au-delà de l'année, il a lui-même fixé une plus longue durée à la saisine, alors sa volonté doit être exécutée comme n'ayant rien de contraire à l'ordre public ni aux bonnes mœurs. L'on dit qu'il serait absurde que celui qui pourrait disposer de son mobilier au préjudice de l'héritier ou des légataires, ne pût cependant ordonner que ce même mobilier resterait en dépôt dans les mains de l'exécuteur testamentaire : que qui peut le plus, peut le moins, etc."

§ Delvincourt, p. 373, this author expresses a similar opinion as Duranton where the testator has made no special mention of the period of the *saisine*, and arrives at the same legal conclusions even upon the general question, but particularly so where there is no *légitime*, hence he concludes that the art. 1026, applies only in the silence of the testator, and "dans le cas contraire, la question rentre dans le droit commun d'après lequel les dispositions des testaments doivent être exécutées toutes les fois qu'elles ne sont pas contraires aux bonnes mœurs, etc. Je pense, par la même raison, que le testateur peut donner à son exécuteur testamentaire, la saisine, non seulement de son mobilier, mais encore de toute sa succession, pourvu qu'il n'en résulte pas de préjudice au droit des légitimaires, etc." Now by our statutory enactments, a testator may not only give his *mobilier* but all his estate to his executors, and according to our jurisprudence, not for a year and day only, but for years and until the perfect completion and fulfilment of the last will, and the *saisine* would therefore necessarily and legally accompany these testamentary dispositions : where then would be the *saisine* of the *héritier*, his presumed possession of the property bequeathed,

which by the law, he shall not and cannot expect to have from the executor, and so even when by the law the title of the executor *répugnait à la qualité du propriétaire* ; this unrestrained and unlimited power of devising makes the *saisine* of the executor better than that of the *héritier successible*, and such being the rights of the executor, the practical effects of the customary maxim *le mort etc.*, exhibit themselves in the *étude des conflits entre plusieurs prétendants à la saisine*. It would therefore appear from the foregoing, that whatever was the object of the origin of the *saisine* from the public law, it became dependent upon and connected under the old law with the property of the estate, of which the possession was sought to be had, it was a *saisine* of property, and as to the *mobilier*, but by that old law, controlled by the right of the executor under the will ; that by the abolition of the *réserves et légitimes* under the power given to devisors by the statutes, the will became the only title or right to *saisine*, and, in effect, a better title than the legal maxim of the custom ; and that in this country since the statute of 1801, the *légataire universel, ou à titre universel*, being the *héritier de notre droit civil, trouve dans son titre seul tous les avantages* of the *possessio bonorum, saisine* and all, “ donc l'idée de la saisine devient tout-à-fait “ superflue, dès qu'on s'occupe de l'héritier qui jouit de “ tous les prérogatives de son titre, et qui s'est mis en “ possession du patrimoine. Il est *pater familias* alors, et la “ saisine disparaît dans la plénitude de son droit.” Now, in this case, it must be observed that there are no *propres* in the estate, and that the testator in the exercise of his legal power has given every thing he had to his nephew, the plaintiff, to the complete exclusion of his *héritiers successibles*, and this nephew is in actual possession. Pothier and others of our best esteemed authors maintain that in such a case as this, where the universal legatee is in possession, the action *en délivrance de legs* is useless, and should not be allowed *nam vitandus est circuitus*. If the *héritiers successibles* refuse to act upon the fictitious *saisine*,

and pretend rights *à l'encontre* to those of the universal legatee, under the will, it is for them to wage them and attack him by a direct action. It is for these reasons that I am of opinion to reverse the judgment in this cause rendered by the Superior Court.

Le jugement en Cour d'Appel est comme suit :

La Cour, etc.,.... Vu que la liberté de tester de tous les propres, acquets et conquets, au profit de qui que ce soit, suivant la volonté du testateur, est accordée par le statut Imp. 14 Geo. III, c. 83, sec. 10, tel qu'expliqué par le Stat. Prov. B. C., 41, Geo. 3, c. 4. Attendu qu'en conséquence de cette législation spéciale, la règle de notre ancien Droit Coutumier, "le mort saisit le vif," a cessé de recevoir son application, lorsqu'il existe des dispositions testamentaires et actes de dernière volonté de la part du défunt. Attendu que la faction de testament et la succession testamentaire sont tombées dans le Bas-Canada sous l'empire du droit écrit.

Attendu que, dans ce droit, le légataire universel devenait saisi de l'hérédité du testateur, en vertu et par la force seul du testament ; et que, dans l'espèce, l'intimé n'était pas tenu de demander délivrance de legs à qui que ce soit.

Attendu, partant, que dans le jugement dont est appel, savoir, celui rendu par la Cour Supérieure, siégeant à Québec, le 6 décembre, 1859, nommément dans cette partie du dit jugement qui condamne les appelants, comme héritiers du sang de feu Jean-Baptiste Blanchet, Ecr., *de cujus bonis*, à faire délivrance à l'intimé, de son legs : et, dans tout le dispositif d'icelui jugement, au sujet de la dite délivrance et les prétendues conséquences, il y a mal jugé : La Cour infirme, annule et met au néant le dit jugement en entier ; et, en rendant celui que la dite Cour aurait dû prononcer, déboute le dit intimé de sa demande en délivrance de legs, le renvoie de son action et le con-

damne aux dépens au profit des appelants, tant devant la Cour Supérieure qu'en appel ; etc., etc. (1)

FOURNIER et GLEASON, pour les appelants.

LELIEVRE et ANGERS, pour l'intimé.

BANC DE LA REINE, }
 EN APPEL. } DICTRICT DE MONTREAL.

Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chef,
 AYLWIN, DUVAL et BRUENAU, Juges.

LAVIOLETTE..... *Appelant.*

et

MARTIN..... *Intimé.*

Jugé :—1o. Que des époux domiciliés et mariés dans le Bas-Canada sont régis dans leurs relations comme tels par la loi du Bas-Canada, lors-même qu'ils vont s'établir à l'étranger.

2o. Que la vente par la femme ainsi mariée, conjointement avec son mari, mais sans mention d'autorisation de ce dernier, faite dans l'Etat de New-York, où cette autorisation n'est pas requise, d'immeubles situés dans le Bas-Canada, est absolument nulle, tant sous le rapport du statut personnel qui régit la personne de la femme, que sous le rapport du statut réel quant à l'aliénation des immeubles.

3o. Que la ratification subséquente, avec l'autorisation du mari, ne peut valider une semblable vente, et n'a l'effet d'aliéner la propriété que du jour de telle ratification.

Held :—1o. That husband and wife domiciliated and married in Lower-Canada are regulated in their relations as such by the law of Lower-Canada, even though they should fix their residence in a foreign country.

2o. That a sale by a woman so married, jointly with her husband, but without statement of authority on his part, made in the state of New-York, where no such authority is required, of immoveables situate in Lower-Canada, is absolutely void, as well under the Law which regulates personal rights and governs the rights of the wife, as under the Law with respect to realty governing the sale of immoveables.

3o. That a subsequent ratification under the authority of the husband, cannot give validity to such a sale, and only effects a transfer of the property from the date of such ratification.

Jugement rendu le 8ème jour de juin, 1861.

SIR L. H. LaFontaine, Bart., Juge-en-Chef. — La question que nous avons eu à examiner en premier lieu, est d'une extrême importance, et est en même temps l'une des questions les plus ardues qui puissent se présenter, puisqu'il s'agit de l'interprétation et de l'application du statut personnel ou du statut réel, voire même de l'un et de l'autre.

(1) Sir L. H. La Fontaine, Juge-en-Chef, Bart., et Duval, Juge, *Dissentientibus*.

tre. L'on sait combien est grande la divergence d'opinions exprimées par les auteurs qui ont écrit sur cette matière. S'ils s'accordent sur quelques principes généraux, il n'en est pas de même quand ils abordent les cas particuliers auxquels il faut faire l'application de ces statuts. C'est alors que les exceptions que les uns et les autres croient tour-à-tour devoir admettre et combattre, se présentent en si grand nombre et si perplexes, que, lorsqu'on a fini de lire les dissertations des commentateurs, l'esprit, loin de se trouver soulagé, reste aussi incertain qu'il pouvait l'être au point du départ, quant à l'application à faire des principes généraux, surtout quand il y a eu changement de domicile, comme dans le cas actuel.

Baby et sa femme, nés dans le Bas-Canada, y contractent mariage et continuent d'y résider après leur mariage. C'est donc dans le Bas-Canada qu'était leur domicile matrimonial. Madame Baby y possédait, à elle seule appartenant, 750 arpents de terre, sur lesquels elle créa une hypothèque, le 23 novembre, 1837, pour la sûreté du paiement de trois obligations notariées par elle consenties ce jour-là aux sieurs Cameron, Cowie et Dease, desquelles obligations l'appelant est devenu le cessionnaire par acte du 2 mai, 1850.

Quelques jours après avoir consenti ces obligations, Baby et sa femme quittèrent le Bas-Canada et allèrent résider à Albany, dans l'Etat de New-York, et ne revinrent qu'environ trois ans après dans le Bas-Canada, qui était le lieu de leur naissance et de leur domicile matrimonial, et où ils ont continué d'habiter depuis leur retour jusqu'à présent.

Durant leur séjour à Albany, ils ont, par acte sous seing privé du 15 décembre, 1837, vendu les susdits 750 arpents de terre à Orville Clarke, qui, le 23 janvier, 1839, les a revendus au nommé Comstock, de qui l'intimé en a acheté trois arpents en mars, 1841.

Dans l'acte d'allénation fait à Albany, le 15 décembre,

1837, il n'est pas dit que madame Baby était *autorisée de son mari à faire cette aliénation, ou à contracter ainsi avec Clarke*. Mais le mari était présent à cet acte, et vendait conjointement avec sa femme. Il est établi qu'un tel acte est valable suivant les lois de l'Etat de New-York. Aussi, l'intimé prétend-il que c'est d'après ces lois qu'il faut juger de la validité du contrat, puisqu'à la date de ce contrat, Baby et sa femme avaient leur domicile dans l'Etat de New-York, et non d'après les lois du Bas-Canada, lois de leur domicile matrimonial, selon lesquelles l'acte du 15 décembre, 1837, serait frappé d'une nullité absolue, à raison de l'absence d'autorisation de la part du mari, nullité que l'appelant invoque aujourd'hui.

Ce dernier appelle de plus à son secours deux actes subséquents au retour de Baby et sa femme dans le Bas-Canada, le premier étant un acte notarié fait à Québec, le 28 juin, 1844, par lequel madame Baby, agissant sous l'autorisation expresse de son mari, déclare non seulement ratifier l'acte de vente du 15 décembre, 1837, mais même faire à Clarke une nouvelle vente des terres en question, à la charge des hypothèques dont il s'agit, ainsi qu'il avait été stipulé à cet égard dans le dit acte du 15 décembre ; et le 17 avril, 1847, Comstock obtient de Clarke un acte au même effet.

Les faits ainsi exposés, l'ont voit qu'il s'agit en premier lieu du statut qui règle la capacité des personnes, et en second lieu du statut réel qui affecte les biens immeubles, et par conséquent de savoir si, dans l'espèce, sous l'autorité de l'un ou de l'autre de ces statuts, l'acte du 15 décembre, 1837, est nul, vu qu'il n'y est pas déclaré que la femme était autorisée de son mari.

L'article 223 de la Coutume de Paris porte que : “ La femme mariée ne peut vendre, aliéner, ni hypothéquer ses héritages, sans l'autorité et consentement exprès de son mari ; et si elle fait aucun contrat sans l'autorité et consentement de son dit mari, tel contrat est nul, tant

“ pour le regard d'elle, que de son dit mari, et n'en peut
 “ être poursuivie, ni ses héritiers après le décès de son
 “ dit mari.”

Suivant l'article 224 : “ Femme ne peut ester en juge-
 “ ment sans le consentement de son mari, si elle n'est au-
 “ torisée ou séparée par justice, et la dite séparation exé-
 “ cutée.”

L'article 226 est en ces termes : “ Le mari ne peut
 “ vendre, échanger, faire partage ou licitation, charger,
 “ obliger, ni hypothéquer le propre héritage de sa femme,
 “ sans le consentement de sa dite femme, et icelle de par
 “ lui autorisée à cette fin.”

Puis l'article 234 porte : “ Une femme mariée ne se
 “ peut obliger sans le consentement de son mari, si elle
 “ n'est séparée par effet ou marchande publique etc.”

Tels sont les principaux articles de la coutume de Paris, qu'il me paraît, pour le moment, nécessaire de citer, pour indiquer la position relative du mari et de la femme, vis-à-vis l'un de l'autre, surtout quand il s'agit de l'aliénation des biens de cette dernière et des contrats qu'elle peut faire.

Pothier, *Traité de la Puissance de mari*, no. 3 ; “ On
 “ peut définir l'autorisation du mari, qui est nécessaire à la
 “ femme, un acte par lequel le mari *habilite* sa femme
 “ pour quelque acte, qu'elle ne peut valablement faire que
 “ dépendamment de lui.”

“ No. 5. L'autorisation du mari étant requise pour
 “ *habiliter* la femme à contracter, laquelle, tant qu'elle est
 “ sous puissance de mari, en est, sans cette autorisation,
 “ absolument incapable, la nullité des contrats et autres
 “ actes qu'elle a faits sans cette autorisation, est une nul-
 “ lité absolue, qui ne peut être purgée ni convertie par la
 “ ratification que la femme ferait de cet acte depuis sa vi-
 “ duité ; cette ratification ne peut donc rendre valable
 “ l'acte qui a été fait sans l'autorisation de son mari ; elle

“ ne peut valoir que comme un nouveau contrat, qui ne
 “ peut avoir d’effet que du jour qu’elle est intervenue.”

“ No. 6.—Cette autorisation n’est pas un simple consen-
 “ tement ; le contrat auquel le mari aurait donné son con-
 “ sentement, en y souscrivant, ne sera pas pour cela va-
 “ lable, s’il n’a pas expressément autorisé la femme pour
 “ le faire.”

En voilà assez, ce me semble, pour démontrer que l’acte
 du 15 décembre, 1837, s’il eût été fait, tel qu’on le pré-
 sente aujourd’hui, dans le Bas-Canada, eût été radicale-
 ment nul.

Voyons maintenant si, ayant été fait dans un pays
 étranger, où ces sortes d’actes sont valables, par des per-
 sonnes du Bas-Canada, qui y avaient établi domicile,
 l’acte du 15 décembre, 1837, peut-être argué de nullité
 selon les lois de notre pays. Ceci nous fait entrer dans
 l’examen du statut personnel et du statut réel.

L’un des principes généraux en cette matière, non con-
 testés, est, ainsi que l’exprime Fœlix, No. 14, que “ le
 “ principe de l’application des lois étrangères dans le ter-
 “ ritoire d’une nation, appartient, non au droit privé, mais
 “ au droit des gens : bien qu’il s’agisse au fond d’appli-
 “ quer des dispositions du droit privé, cependant cette ap-
 “ plication n’a lieu que par suite de rapports de nation à
 “ nation.

“ On peut donc appeler *jus gentium privatum*, le droit
 “ international ayant pour objet les conflits entre le droit
 “ privé des diverses nations, tandis qu’on réserve la dé-
 “ nomination de *jus gentium publicum* pour désigner le vé-
 “ ritable droit des gens, qui règle les rapports de nation
 “ à nation comme telles.”

Si, pour leur utilité et convenance réciproques, les na-
 tions admettent dans certains cas l’effet des lois étrangères,
 ce n’est que comme concession et non comme un droit.
 Le premier devoir d’un Etat étant de faire respecter les

lois qu'il a décrétées pour la protection de ses nationaux, les tribunaux appelés à faire l'application d'une loi étrangère, ne doivent pas perdre de vue cette protection, surtout si la loi étrangère est en opposition à une loi d'ordre public de l'Etat où l'on demande de donner effet à la première. La concession dont il s'agit étant principalement fondée sur l'usage observé par chaque nation, nous avons à examiner si, dans le cas actuel, cette concession peut ou doit aller jusqu'à la limite que je viens d'indiquer.

“ L'usage et la convention tacite des nations,” dit Fœlix, No. 22, “ ont établi comme règle générale, que les lois *personnelles* suivent l'individu et lui sont applicables, même lorsqu'ils se trouvent en pays étranger ; qu'au contraire les lois *réelles* n'exercent leurs effets que dans le territoire, que les lois concernant les formes sont applicables à tous les individus qui passent des actes dans le territoire ; ou qui y plaident ou font exécuter des jugements ou actes ; enfin, que la substance des actes, le *vinculum obligationis*, est régi, tantôt par la loi personnelle, tantôt par la loi réelle, tantôt par la loi en vigueur où le contrat ou la disposition ont reçu leur perfection ; tantôt même par la loi du lieu de l'exécution du contrat ou de la disposition.”

“ Le statut *personnel* est une loi dont les dispositions affectent directement et uniquement l'état de la personne, c'est-à-dire l'universalité de sa condition, de sa capacité ou incapacité de procéder aux actes de la vie civile ; une loi qui imprime à la personne une qualité générale, sans aucun rapport avec les choses, si ce n'est accessoirement et par une conséquence de l'état ou de la qualité de l'homme, objet principal du législateur.

“ Ainsi, est statut personnel la loi qui détermine si l'individu est citoyen ou étranger ; la loi qui établit la légitimité, qui fixe l'âge de majorité, et les formalités relatives à la célébration du mariage ; celle qui désigne les personnes qui peuvent contracter mariage et les

“ causes de sa dissolution ; *celle qui soumet la femme à la puissance du mari*, le fils de famille à la puissance du père, le mineur à celle du tuteur ; *celle qui établit la capacité de s'obliger ou de tester.*

“ On appelle statuts réels les lois qui ont les choses pour objet principal, qui affectent directement les choses, qui en permettent ou défendent la disposition, sans avoir aucun rapport à l'état ou à la capacité générale de la personne, si ce n'est d'une manière incidente ou accessoire, et par voie de conséquence ; comme lorsque la loi augmente ou diminue, dans des cas particuliers, le droit de disposer de choses qui appartiennent à la personne d'après l'universalité de son état. Le statut réel impose aux choses une certaine qualité, qui réfléchit naturellement sur les pouvoirs de la personne.”

“ La nature personnelle ou réelle de la loi, dit Rodenburg, se détermine par la nature de l'objet ou de l'acte auxquels s'applique la faculté interdite ou permise à la personne. Ainsi, la loi qui, laissant un homme dans son état d'incapable, se borne à lui permettre un acte réel, une disposition sur les biens, n'affectent point la personne, et elle est purement réelle ; il en est de même de la loi qui, tout en conservant à l'homme sa capacité générale, lui interdit un mode particulier de disposer de ses biens.” (1)

Un autre principe général en cette matière est, ainsi que l'exprime Fœlix, No. 26, que “ la loi personnelle de chaque individu, la loi dont il est sujet quant à sa personne, est celle de la nation dont il est membre. Pour justifier cette assertion, il faut considérer la position de l'individu au moment de sa naissance.”

“ Les lois personnelles suivent la personne partout où elle se trouve : leur force et leurs effets s'étendent sur tous les territoires.” (No. 29) “ Cette règle,” ajoute l'au-

(1) Voir aussi Boullenois et le Répert. de Jurisp., vbo. *Autorisation maritale*, cités par Fœlix, No. 23.

teur, " a pour elle l'accord presqn'unanime des auteurs et " la jurisprudence des tribunaux des diverses nations." Rodenburg donne pour motif de cette règle, l'intérêt commun des nations : " il serait contradictoire," dit-il, " qu'un individu changeât d'état et de condition toutes les " fois qu'un voyage l'amène dans un autre endroit ; que " dans le même moment il fut majeur ici, mineur là ; que " la femme fut en même temps soumise à la puissance ma- " ritale, et libre de cette puissance ; qu'un individu fut con- " sidéré dans un lieu comme interdit, et dans un autre lieu " comme capable de tous les actes de la vie civile." (1)

Aux rapports que les lois du Bas-Canada ont établis entre le mari et la femme, peuvent s'appliquer tantôt les règles du statut personnel, tantôt celles du statut réel, et quelquefois les règles de l'un et de l'autre en même temps.

D'après la définition qui a été donnée du statut personnel, l'incapacité de contracter sans l'autorisation de son mari, dont la femme est frappée par les lois du Bas-Canada, celles de son domicile matrimonial, tombe sous la dénomination de ce statut, de même que celle qui atteint l'individu en minorité. L'incapacité de la femme sous puissance de mari est même plus grande que celle du mineur, puisque, dans le premier cas, la nullité qu'elle entraîne est absolue, tandis que, dans le second cas, elle n'est généralement que relative. La position que nos lois font à la femme mariée, est, comme toutes celles qui concernent l'état des époux, réglée par une loi d'ordre public, établie pour la protéger elle et ses biens. Avant notre loi d'enregistrement, la femme pouvait s'obliger personnellement pour son mari d'une manière illimitée. Sous l'autorité de cette nouvelle loi, elle ne peut plus s'obliger pour lui que comme commune en biens, nouvelle preuve que l'esprit et le but de notre législation sont de protéger la femme mariée dans sa fortune et ses biens, autant que possible. Donner effet à une loi étrangère qui serait en

(1) Boullenois, Pardessus et les autres auteurs cités par Foelix, du nombre desquels sont Henry, Story, Wheaton et Burge.

opposition à cette législation, ne serait-ce pas anéantir nos propres lois, lois qui, de leur nature, sont même prohibitives? Or c'est un principe universellement reconnu que la concession que le droit international ou l'usage des nations a consacrée, d'admettre l'application d'une loi étrangère, ne peut s'étendre au cas où elle serait en opposition à des lois expressément contraires ou prohibitives du territoire où on veut la faire valoir.

Puisque c'est une règle de droit international, non contestée, que le statut personnel suit l'individu, même au-delà de son territoire, je suis porté à conclure que l'incapacité de contracter sans l'autorisation expresse de son mari, dont madame Baby a été frappée du moment de son mariage, étant réglée par ce statut, l'a suivie jusque dans l'Etat de New York, et que tout contrat qu'elle a pu y faire sans cette autorisation, bien que fait selon les lois de cet Etat, doit être traité comme nul dans le Bas-Canada, et par conséquent ne pouvant y produire aucun effet; il en doit être ainsi, même en admettant cette autre règle qu'après le changement de nationalité ou de domicile, lorsque tel changement peut avoir lieu, "la loi de la nouvelle patrie, "ou du nouveau domicile, exerce sur l'individu les mêmes "effets que celle de la patrie originaire ou du domicile "d'origine avait exercés jusqu'alors." (1) Selon cette règle, si un contrat fait par madame Baby sans l'autorisation de son mari, dans l'Etat de New York, est valablement fait, ce contrat doit être restreint dans ses effets, au territoire de sa perfection, ou si même, étant valable au lieu où il a ainsi été fait, ce contrat est de la nature de ceux qui peuvent être quelquesfois admis à produire effet en pays étranger, toujours faudrait-il qu'il ne fût pas en opposition à des lois prohibitives de ce pays.

Sous un autre point de vue, l'on doit dire que le statut *réel* s'applique au cas actuel, aussi bien que le statut personnel; que, dans le fait, les deux espèces de statuts y

(1) Foelix, No. 27.

sont applicables. L'acte du 15 décembre, 1837, est une *disposition ou aliénation d'immeubles situés dans le Bas-Canada*. " Si l'acte est réel, tel que sont les *aliénations de biens*, le statut sera *réel*," dit Boullenois ; et suivant les auteurs du Répertoire de Jurisprudence, à l'endroit déjà indiqué, " si l'objet principal, direct, immédiat de la loi est de régler la qualité, la nature des biens, *la manière d'en disposer*, le statut sera *réel*." L'acte du 15 décembre, 1837, est donc *réel* ; il doit être gouverné par le statut réel. La loi du Bas-Canada qui défend au mari de vendre " le propre héritage " de sa femme, et qui en prohibe à celle-ci l'aliénation sans l'autorisation de son mari, est donc ce statut réel, puisque son objet principal, direct, immédiat, est de régler " la manière de disposer des biens " de la femme sous puissance de mari. Or ce statut ne permet pas d'admettre la loi de l'Etat de New-York, et rejette l'acte du 15 décembre, 1837.

En parlant du cas où les deux espèces de statuts sont applicables, Félix dit, No. 43 : " Les deux espèces de statuts sont applicables, et il y a nécessité de suivre encore la loi concernant les formes, et, s'il y a lieu, de se conformer aux lois qui peuvent régir la substance de l'acte, toutes les fois qu'il s'agit d'acquisitions ou d'actes qui réclament le concours de la volonté de l'homme, tels que les actes entre-vifs, à titre onéreux ou gratuit, ainsi que les actes de dernière volonté." En un mot, la validité des actes de l'homme exige, en règle générale, l'observation simultanée des dispositions contenues dans quatre espèces de lois, savoir : 1o. et 2o. celles qui régissent les personnes des deux contractants ou parties intéressées ; 3o. la loi de la situation des immeubles ; 4o. celle qui détermine les formes extérieures à suivre dans la rédaction de l'acte. Quelquefois une cinquième espèce de loi trouve son application : ce sont celles qui servent d'interprétation aux clauses de la convention. Ricard exposait cette doctrine dans les termes suivants :

" Il y a quatre sortes de coutumes qu'il faut considérer

“ pour juger de la validité des donations entrevifs et testamentaires : du lieu où la disposition est faite, du domicile du donateur, du domicile du donataire et de la situation des choses données.” M. Wheaton exprime la même idée. En effet, la personne qui consent l’aliénation ou la concession d’un droit immobilier, de même que celle au profit de laquelle la transmission ou l’acquisition a lieu, doivent avoir la capacité civile générale requise par le statut personnel (par exemple, d’être majeur, pour celui qui dispose, et d’être conçu au moment de la disposition ou transmission pour le bénéficiaire) ; il faut que la loi de la situation des immeubles permette d’en disposer de la manière dont les parties (ou celle qui dispose seule à cause de mort,) l’entendent ; en même temps on suivra les prescriptions de cette loi en tout ce qui concerne le mode de la transmission et de l’acquisition de la propriété des immeubles ou des droits réels sur les immeubles ; et, dans tous les cas, les parties (ou celle qui dispose seule) sont tenues d’observer les lois qui régissent les formes extérieures de l’acte, lesquelles sont, en règle générale, celles du lieu de sa rédaction.”

Selon ces principes qui me paraissent être incontestables, on ne saurait reconnaître que l’acte du 15 décembre, 1837, puisse avoir aucun effet dans le Bas-Canada. Il y est frappé de nullité absolue, soit qu’il s’agisse de décider d’après le statut personnel ou d’après le statut réel,

Voyons quels seraient, dans d’autres cas analogues au présent, les effets de la doctrine contraire.

Si nous avons encore la réserve des quatre quints des propres, dont un article de la Coutume de Paris ne permettait pas de disposer par testament, la femme mariée du Bas-Canada, en suivant son mari dans un pays étranger où cette réserve n’est pas admise, pourrait, par un testament fait dans ce pays, se soustraire à l’empire de cette loi prohibitive du Bas-Canada, transmettre à qui elle voudrait ces quatre quints, et en dépouiller les héritiers légitimes

auxquels nos lois les destinaient, malgré la volonté de la testatrice.

Si les lois du pays étranger où cette femme va s'établir, n'exigent pas l'enregistrement de l'acte de vente pour garantir l'acquéreur contre des créanciers hypothécaires, mais qu'au contraire ces lois déclarent que l'acquéreur ne sera pas troublé à cause de ces hypothèques, il s'ensuivra que nos lois d'enregistrement, faites pour la protection de ces créanciers, ne seront plus qu'une lettre morte, en présence du contrat de vente passé en pays étranger, tandis que ce contrat, s'il eût été fait dans le Bas-Canada, n'aurait pu avoir cet effet spoliateur.

Un mineur qui, d'après nos lois, ne peut disposer de ses biens immeubles avant d'avoir atteint sa majorité, qui est de vingt et un ans, pourrait, en allant s'établir dans un pays étranger dont la loi permet de disposer des immeubles par testament à l'âge de dix-huit ans, léguer par acte de dernière volonté ses immeubles du Bas-Canada à qui il voudrait.

Je pourrais multiplier ces exemples, mais je crois que ceux que je viens de donner, suffisent pour faire voir quels seraient les effets de la doctrine contraire à celle que je soutiens, et jusqu'à quel point ces effets opéreraient en sens contraire à nos lois positives, et même prohibitives. J'ajouterai néanmoins un quatrième exemple. Nos lois actuelles ne permettant à la femme de s'obliger pour son mari que comme commune en biens, si les lois de l'état de New-York, ou de l'état de Vermont, qui nous avoisinent, permettent, au contraire, à la femme de s'obliger pour son mari d'une manière illimitée, il s'en suivra qu'en allant contracter dans l'un de ces états, elle pourra s'obliger aux dettes de son mari, de manière à absorber non seulement toute sa part de la communauté, mais même tous les autres biens qu'elle peut avoir dans le Bas-Canada, et qui sont ses héritages propres.

“ La cour,.... 1. Considérant que François Baby et sa

femme, Marie Clotilde Pinsonnault, natifs du Bas-Canada, y ont contracté mariage et y ont eu leur domicile matrimonial avant d'aller résider à Albany, état de New-York, un des Etats-Unis d'Amérique ; qu'avant d'aller ainsi résider à Albany, ils avaient tous deux bien et valablement consenti les trois actes ou obligations du 23 novembre, 1837, qui ont donné lieu à la demande en déclaration d'hypothèque dont il s'agit en cette instance, hypothèque originairement créée sur 750 arpents de terre sis et situés dans le Bas-Canada, et appartenant alors à la dite Dame Baby seule ; 2. Considérant que, quoique la dite Dame Baby ait été présente à l'acte de vente sous seing privé du 15 décembre, 1837, fait à Albany, au nommé Orville Clarke, des susdits 750 arpents de terre, il n'est cependant pas dit au dit acte sous seing privé, ainsi fait à Albany, que la dite Dame Baby était autorisée de son mari à faire cette aliénation, ou à contracter ainsi avec le dit Orville Clarke ; que, par conséquent, le susdit acte de vente sous seing privé a été dès son origine frappé de nullité absolue aux yeux des lois du Bas-Canada, où l'immeuble ainsi vendu est situé ; que la même nullité, du moins en ce qui regarde l'appelant, a atteint les actes subséquents d'aliénation des dits 750 arpents de terre, ou d'aucune partie quelconque d'iceux jusqu'à la passation à Québec, de l'acte du 28 juin, 1844, auquel la dite Dame Baby a consenti sous l'autorisation de son mari, et ce depuis leur retour dans le Bas-Canada ; que, par conséquent, l'acte de la vente faite à l'intimé le 20 mars, 1841, et les lettres de ratification qu'il en a obtenues en justice le 18 juin, 1842, ne peuvent préjudicier aux droits de l'appelant, cessionnaire des susdites trois obligations ; 3. Considérant que le dit acte du 28 juin, 1844, passé à Québec, (Panet, Notaire,) est le premier acte valable que l'intimé puisse invoquer ; que cet acte qui a été passé pour obvier à la nullité du dit acte du 15 décembre, 1837, résultant du défaut d'autorisation maritale, a été fait à la charge des hypothèques de la Baie d'Hudson, c'est-à-dire, des hypothèques créées par les trois obligations susdites, de même que l'avait été le dit acte du

15 décembre, 1837 ; qu'il est vrai que le dit acte du 28 juin, 1844, a été enregistré conformément à la loi le 15 nov., 1844, ainsi que l'a allégué l'intimé, mais que cet enregistrement doit, aux termes mêmes du statut de 1843, chap. 22, sec. 6, " profiter à toutes les parties intéressées à icelui," et à l'effet de conserver leurs droits ; que le créancier des dites trois obligations est l'une de ces parties intéressées au susdit acte du 28 juin, 1844 ; 4. Considérant que par acte du 4 novembre, 1850, (Panet, Notaire), Baby et sa femme, de lui autorisée, ont déclaré " se tenir tous les actes et transports pour bien et duement signifiés," c'est-à-dire tous les actes et transports y mentionnés, ce qui comprend les divers transports des susdites trois obligations, y compris celui qui a été fait à l'appelant le 2 mai, 1850 ; 5. Considérant que, dans ces circonstances, l'appelant, comme étant le créancier des trois susdites obligations du 23 novembre, 1837, était bien fondé dans sa demande en déclaration d'hypothèque contre l'intimé à raison de la partie des dits 750 arpents de terre, dont il est possesseur et détenteur, et que, par conséquent, dans le jugement qui le déboute de son action, il y a mal jugé : Infirme le susdit jugement..... et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déboute le dit Martin, défendeur intimé, de ses exceptions et défenses, excepté celle de ses exceptions par laquelle il réclame des impenses et améliorations, et sur laquelle il sera prononcé ci-après, déclare la partie des susdits 750 arpents de terre, dont le dit Martin est possesseur et détenteur, et qui est désignée dans la déclaration du demandeur appelant, affectée et hypothéquée en faveur du demandeur au paiement du montant des trois obligations dont il est créancier, etc.... Et quant à l'exception par laquelle le dit Martin réclame des impenses et améliorations, la Cour renvoie les parties devant la Cour Supérieure pour qu'il soit sur icelle exception procédé et fait droit, suivant le cours de la loi et la pratique de la dite Cour.

Le jugement de la Cour Supérieure rendu par les Hon

Juges Day, Smith et Mondelet, était dans les termes suivants :

“ Considering that it appears by evidence that the deed of indenture and conveyance made and executed on the fifteenth december, 1857, by François Baby and Marie-Clothilde Pinsonault, his wife, to and in favor of Orville Clarke, of the land and premises situated in the township of Sherrington, &c.... was so made and executed in the city of Albany, in the state of New-York, one of the United States of America, then being the actual domicile of her, the said Marie Clothilde Pinsonault, and according to the laws and usages then in force in the said state, and that by the usages and laws of the said state it was not necessary that any marital authorisation should be given by the said François Baby to the said Marie Clothilde Pinsonault, his wife, in order to confer upon her the capacity to make and execute the said deed, or to render the same valid and effectual for the alienation and conveyance of the said land and premises.—And considering that by virtue of the said deed, and the capacity of the said Marie-Clothilde Pinsonault, so to contract and alienate without the marital authorisation of the said Frs. Baby, her husband, the said Orville Clarke became and was, by the laws in force in this province, the lawful proprietor of the said land and premises, and his conveyance thereof was valid and effectual, and that the defendant, by virtue of the deed of sale bearing date the 20th. March, 1841, to him made by David Milligan, as well in his own name as acting for Peter Comstock, legally acquired the land and premises therein described and intended to be conveyed.—And further considering that by reason of the judgment of ratification and confirmation of the said last mentioned deed, rendered on the 18th. June, 1842, on the application and in favor of the defendant, and by force of the statute in such case provided, the said last mentioned land and premises became and were purged, freed and discharged from the hypothecations and mortgages in the said declaration set forth, and from all hypothecations

created or existing thereupon up to the 20th March, 1841 :—
Doth maintain the exception of the defendant in that behalf
pleaded, and it is considered that the action of the said
plaintiff be, and the same is, hence dismissed with costs.

CARTIER et BERTHELOT, pour l'appelant.

LORANGER et LORANGER, pour l'intimé.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chef,
AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

DAY *Appelant.*
et

SCULTHORPE..... *Intimé.*

Jugé :—1o. Que l'ordre des endosse-
ments sur un billet n'est qu'une présomp-
tion des engagements successifs des en-
dosseurs les uns à l'égard des autres, et
que cette présomption peut être écartée
par la preuve d'un entendement ou con-
vention contraire.

2o. Que, dans l'espèce, l'endossement
inscrit par un des endosseurs avec la con-
dition expresse que cet endossement se-
rait précédé par l'endossement d'un tiers,
qui a eu par le porteur du billet la condi-
tion de cet endossement, ne peut donner
à ce tiers un droit d'action contre tel en-
dosseur ; le porteur du billet (qui était le
signataire même) devant être considéré,
dans ce cas, comme le mandataire de cet
endosseur.

Held :—1o. That the order of signa-
tures by indorsement upon a note is a
mere presumption of the undertakings
of the indorsers with respect to one ano-
ther, and that this presumption may be
destroyed by proof of a contrary under-
standing or covenant.

2o. That, in the case submitted, the
indorsation made by one of the indorsers
with the express condition that such in-
dorsement would be preceded by the in-
dorsement of a third party, who was
made acquainted by the bearer of the
note of the condition of this indorsement,
cannot give to such third party a right
of action against such indorser ; the
bearer of the note (who was the maker)
being considered, in such case, as the
agent of such indorser.

Jugement rendu le 1er jour de juin 1861.

L'action était portée contre l'appelant par l'intimé pour
le recouvrement d'un billet que ce dernier alléguait avoir
été fait le 20 août, 1859, pour \$1000, par les nommés W.
Smith & Co., payable à leur propre ordre, et par eux en-
dossé et remis à l'appelant, qui l'aurait à son tour endossé
en faveur de l'intimé, à qui il l'avait remis.

La défense de l'appelant était qu'il n'avait endossé le

billet en question que comme accommodement, et avec l'entendement que l'intimé placerait son nom au-dessus de celui de l'appelant comme second endosseur, et serait tenu au paiement du billet avant l'appelant, et que l'intimé avait connaissance de cette convention en recevant le billet des mains de Smith & Co., qui alors agissaient comme les mandataires de l'appelant, et que, dans ces circonstances, l'intimé n'avait aucun recours contre l'appelant, nonobstant qu'il eût, contrairement à la convention, mis son endossement après celui de l'appelant.

L'intimé répondit par une dénégation à ce plaidoyer.

L'intimé, interrogé sur faits et articles, admit que Smith, un des signataires du billet, lui dit, en lui faisant endosser le billet, que l'appelant voulait avoir la signature de l'intimé au dessus de la sienne ; et il fut également prouvé par ce même Smith, qui fut interrogé comme témoin, que pour obtenir un endossement de l'appelant sur un billet, il lui avait exhibé un billet antérieur, sur le dos duquel l'intimé avait d'abord inscrit son nom après celui de l'appelant, puis l'avait rayé après l'échéance, et inscrit audessus de celui du dit appelant.

La Cour Supérieure ne voulut pas admettre la défense, vu que l'endossement de l'appelant était sans condition, et précédait celui de l'intimé. Voici en quels termes ce jugement a été rendu le 29 février, 1860.

" The Court..... considering that the signature and endorsement of the defendant on the promissory note, plaintiff's exhibit No. 1, is proved, and that such endorsement is unrestricted and unconditional, and precedes that of the plaintiff ; considering that it appears from the evidence that the plaintiff hath paid and satisfied the said note as indorser thereon, subsequent to the said defendant ; considering that the said promissory note was delivered to the said plaintiff to be endorsed by the said defendant by the maker thereof, and that the condition upon which the said note was endorsed and delivered by the maker thereof, to wit, that

he the said plaintiff should write and sign his name thereon as indorser over and above the name of the said defendant, was not made known to the plaintiff as a condition of the defendant's indorsement, at the time of the delivery to him of the said note, and, moreover, that it does not appear that any condition was exacted by Wm. Smith, the maker of the said note, and the agent of the said defendant in that behalf, at the time of the delivering of the said note to the plaintiff for his indorsement, and considering, further, that the said plaintiff did not agree to any special condition, or receive, indorse and negotiate the said promissory note upon the condition alleged in the defendant's plea ; considering, further, that there is nothing in the evidence of record to defeat or impair, in law, the plaintiff's recourse against the said défendant, as waged by the present action, and that the defendant has failed to establish his plea in this cause filed, doth dismiss the said plea, and doth condemn the defendant to pay and satisfy to the plaintiff the sum of \$1000, &c.

Ce jugement, porté devant la Cour d'Appel, a été infirmé pour les motifs qui suivent :

“ La Cour.... 1o. Considérant que l'action du demandeur intimé avait pour objet de faire condamner le défendeur appelant à lui payer le montant d'un billet de \$1000, que le nommé William Smith, faisant ci-devant commerce à Montréal sous la raison de Wm. Smith & Co., avait, le 22 août, 1859, souscrit à son propre ordre, et qui est allégué, dans la déclaration, avoir été endossé d'abord par le dit William Smith, à l'ordre du dit défendeur, puis par ce dernier à l'ordre du dit demandeur, et que le jugement dont est appel a donné gain de cause au dit demandeur ; 2o. considérant que, dans son exception péremptoire à l'action, le défendeur a prétendu qu'il n'avait endossé et remis le dit billet ainsi endossé, non au dit demandeur, mais au dit Wm. Smith lui-même, qu'avec l'entendement et sous l'expresse condition que le dit demandeur serait le premier

endosseur, et écrirait son nom comme tel entre le nom du dit Wm. Smith et celui du dit défendeur, afin que celui-ci eût le dit demandeur pour garant du paiement du dit billet, au cas de non paiement d'icelui à son échéance par le dit Wm. Smith ; qu'ensuite le dit Wm. Smith délivra le dit billet au demandeur pour en obtenir son endossement, avec le même entendement et sous la même condition, à lui expressément déclarée dans cette occasion ; que le demandeur, lorsque Smith lui remit le dit billet, connaissait que l'autorité que le dit Wm. Smith avait de faire usage du nom du défendeur comme endosseur était restreinte par l'entendement et la condition ci-dessus, et qu'il ne devait avoir aucun recours contre le dit défendeur ; que dans ces circonstances le demandeur n'avait pas d'action contre lui ; 3o. considérant que la preuve faite dans la cause, et les réponses mêmes du demandeur sur faits et articles, ont pleinement établi les allégués de la susdite exception ; qu'il est en outre prouvé que le dit Wm. Smith et le demandeur ont, en cette occasion, agi de supercherie envers le défendeur, et se sont entendus et concertés entre eux pour tromper sa bonne foi ; 4o. considérant que dans ces circonstances, le dit demandeur était non recevable dans son action, et que, par conséquent, dans le jugement dont est appel, il y a mal jugé : Infirme le dit jugement, et déboute le demandeur intimé de son action avec dépens.

CASSIDY, pour l'appelant.

BETHUNE et DUNKIN, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—SIR LOUIS H. LaFontaine, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BROWNE..... *Appellant.*

and

Dow..... *Respondent.*

In an action against an indorser, the defendant pleaded by exception that the signatures endorsed on the notes were not his signature, and were not written thereon with his knowledge, consent or authority, and that he was not aware of the existence of the notes, until notified of the protest; he also pleaded a *défense au fonds en fait*, and at the bottom of the pleas there was an affidavit of the defendant, that all the facts articulated therein were well founded.

After evidence adduced, it was urged at the hearing of the cause, that under the 87th sect. of the 20 Vic., cap. 44, the plaintiff was entitled to judgment, the affidavit not being in the form required. Upon this, a motion was made by the defendant to discharge the *délibéré* and to have the case struck from the roll, and that he be permitted to file the affidavit produced with the motion in support of his pleas.

Heid, in the Superior Court, Montreal:—That the motion was inadmissible; that the right of the plaintiff to have the signatures taken as genuine, and to judgment was a *droit acquis*, and ought not to be interfered with by the Court, the genuineness of the signatures not having been legally put in issue.

In Appeal:—10. That the affidavit was sufficient.

20. That the signature indorsed on the notes was not the signature of the appellant, but was forged. (1)

Dans une action contre un endosseur, le défendeur plaide par exception que les signatures apposées sur les billets n'étaient pas sa signature, et n'y avaient pas été apposées à sa connaissance, de son consentement ou avec son autorité, et qu'il ne connaissait pas l'existence des dits billets, avant la signification du protêt; il plaide aussi une *défense au fonds en fait*, et au bas de ces plaidoyers était un affidavit du défendeur, que tous les faits articulés en leurs étaient bien fondés.

La preuve faite, il fut prétendu lors de l'audition de la cause, que le demandeur devait obtenir jugement en vertu des dispositions de la 87^{me} section de la 20 Vic. Cap. 44, l'affidavit n'étant pas dans la forme voulue. Sur ce, motion fut faite par le défendeur pour rayer la cause du rôle, et la retirer du *délibéré*, et qu'il lui fût permis d'enfiler l'affidavit produit avec la motion au soutien de ses plaidoyers.

Jugé, dans la Cour Supérieure, Montréal:—Que la motion était inadmissible; et que le droit du demandeur de prendre les signatures comme vraies, et d'obtenir jugement était un droit acquis, quant auquel la Cour ne devait pas intervenir, la vérité des signatures n'ayant pas été légalement révoquée en doute.

En Appel:—10. Que l'affidavit était suffisant.

20. Que la signature endossée sur les billets n'était pas la signature de l'appellant, mais était contrefaite.

Judgment rendered the 1st. June, 1861.

AYLWIN, Justice, *dissenting*.—Stated in effect: That the action was brought against the endorser of three promissory notes, the plea was that the appellants signature on the notes "was not written by him, and was not written

(1) For report of this case in the Court below, see 10, L. C. Rep. p. 412, Dow vs. Browne.

"thereon with his knowledge, consent and authority, and that he was not aware of the existence of the promissory notes until notified of the protests." To the pleas there was appended a general affidavit that the facts set forth in these pleas were true. The question was whether this was sufficient under the 87th. sect. of the 20th. Vict., cap. 44, which enacted that the signature to a note &c., "should be presumed to be genuine" unless an affidavit were made that "such instrument or some material part thereof is not genuine, or that his signature, or some other, to or upon such instrument, is forged."—He held with the Court below, that the plea and affidavit were not sufficient under the statute. The statute admitted of no circumlocution or periphrase. It was not sufficient to set up facts from which forgery might, or might not, be inferred; the statute did not permit of inference, the word forgery must be used, *à peine de nullité*—In other statutes, in the cases of *capias*, and attachment before judgment, it had been repeatedly held, that the very language of the statute must be used, and the same particularity should be required here—where the object was to prevent delays. Had there been an affidavit of forgery, this would have thrown the *onus* upon the defendant; he must in that case have begun his *enquête* and made out his case. This had not been done, and the plaintiff had no opportunity of producing evidence in rebuttal.

An application had been made in the Court below to substitute another and a correct affidavit, and at first he was disposed to think that the application should have been granted, but upon reflection he did not think the express terms of the law could be got rid of in that way.

The argument drawn from the general form of affidavit used in cases of opposition ought not to prevail. The general form of the affidavit in such cases is a cloak for perjury, and no extension should be given to it, on the contrary, it should be restricted within the narrowest possible limits.

SIR L. H. LAFontaine, Bart. C. J.—La demande avait pour objet le paiement de trois billets prétendus avoir été souscrits par le nommé Thomas R. Browne, à l'ordre du défendeur appelant, et passés à l'ordre, d'abord, de William Dow et Cie., puis du demandeur intimé, formant en capital, intérêts calculés jusqu'au 19 octobre, 1859, et frais de protêt, la somme de \$1486 71.

Le défendeur appelant a présenté une exception péremptoire, qui contient trois chefs entièrement semblables, y ayant un chef applicable à chacun des billets. Il suffit donc d'en citer un seul. "The plaintiff cannot have and
" maintain his said action, nor the conclusions by him
" taken in and by his said declaration, because he the de-
" fendant saith, that the signature "George Browne" not
" and signed to, and written and endorsed upon the pro-
" missory note in the plaintiff's declaration firstly referred
" to, and in this cause produced and filed, as plaintiff's
" Exhibit no. 1., is not his signature, was not written by
" him, and was not written thereon with his knowledge,
" consent, or authority, and that he was not aware of the
" existence of said promissory note until notified that the
" said promissory note had been protested: And the said
" defendant further saith that he never promised to pay
" the sum of money in the said note specified, or the
" interest thereon, or the costs or expenses of protest and
" notice thereof, or any part thereof, but on the contrary
" that he hath always and wholly refused so to do, for the
" reason aforesaid."

L'Exception péremptoire est suivie d'une défense au fonds en fait. Puis, au bas de ces deux plaidoyers est l'affidavit suivant, fait et signé par le défendeur; "And
" the said defendant being duly sworn doth depose and
" say, that all the facts articulated and set forth in the fore-
" going pleas, are, and each of them is, true and well foun-
" ded, and hath signed."

Dans sa réponse à l'exception péremptoire, le demandeur

s'est contenté d'une dénégation générale des faits qui y sont articulés, et que le défendeur affirme de nouveau dans sa réplique à cette réponse.

Le 24 novembre, 1859, deux consentements, signés des procureurs des parties, sont produits dans la cause, l'un à l'effet que les parties soient dispensées mutuellement de faire l'articulation de faits requise par la 74e section de l'acte de judicature de 1857, et l'autre à l'effet que l'enquête soit faite en la manière suivie avant cet acte de judicature. Puis, le 25 janvier, 1860, le demandeur inscrit au rôle de droit pour enquête et audition au mérite le 8 février suivant.

D'après l'appréciation que j'ai faite des témoignages produits de part et d'autre, j'en suis venu à la conclusion que la signature, "George Browne," écrite au dos des billets en question, n'est pas la vraie signature du défendeur, qu'elle est contrefaite. Trois témoins ont été entendus de la part du demandeur, et quatorze de la part du défendeur.

Le 8 février 1860, les parties ayant déclaré leur enquête close, et ayant été entendues au mérite, la cause fut prise en délibéré. Le 27, le défendeur fait motion, (appuyée sur des affidavits) pour obtenir que la cause soit retirée du délibéré, afin qu'il lui soit permis d'ajouter à son premier affidavit écrit au bas de ses plaidoyers, en jurant en propres termes que sa signature avait été contrefaite (forged). Le 19 mars, les parties sont entendues sur cette motion, et le 31 du même mois, intervient le jugement dont est appel, qui rejette la motion du défendeur, et le condamne à payer le montant de la demande, principalement sur le motif que le plaidoyer du défendeur, dans lequel il déniait sa signature aux billets, n'était pas accompagné d'un affidavit fait conformément aux dispositions de l'acte 20 Vict., ch. 44, sec. 87. Cette section est la 86e du chapitre 83, des statuts refondus du Bas-Canada, et elle est là subdivisée en trois parties. La première partie contient une disposition à peu près semblable à celle de la 10e section du statut de 1801,

ch. 7. Il y a seulement cette différence, qu'elle exige moins de formalités. Sous l'autorité du statut de 1801, un demandeur en paiement d'un billet avait tout le bénéfice de la présomption établie par ce statut, lorsque, par sa déclaration, il avait conclu à ce que le débiteur comparût pour reconnaître ou nier sa signature, et lorsque le billet avait été dûment signifié au défendeur, en lui en exhibant l'original, et lui en laissant copie avec la déclaration. Si, dans ce cas, le défendeur faisait défaut, le billet était tenu pour reconnu, et la Cour procédait à donner jugement. Mais il fallait que "le service et exhibition du billet, fussent faits à la personne du défendeur, et que l'huissier qui avait fait tel service, fût tenu de l'affirmer devant un des Juges de la Cour." Ce n'était donc qu'une simple présomption de droit au profit du demandeur, puisqu'il suffisait d'une simple comparution du défendeur pour la faire disparaître.

La première partie de la 86^e section du chap. 83 ci-dessus cité, établit la même présomption,— "si.... le défendeur fait défaut, ou si pour toute autre raison le demandeur se trouve avoir droit de procéder *ex parte*, alors," porte la section, "tel billet.... et toute signature et écriture sur icelui, *seront présumés vrais* sans en faire la preuve, et jugement pourra être rendu en conséquence."

La deuxième partie de la même section dispose pour le cas où la signature est *niée* par le défendeur. "Que cette dénégation soit faite en plaidant la dénégation générale," (permettant ainsi de nouveau de plaider cette dénégation générale), "ou dans d'autres plaidoyers, telle signature sera néanmoins *présumée vraie*.... à moins qu'avec tel plaidoyer il ne soit produit un affidavit du dit défendeur ou de quelque personne agissant comme son agent, ou commis, et connaissant les faits en telle qualité, à l'effet que.... sa signature.... est contrefaite" (*forged* dans la version anglaise).

Enfin, dans la troisième partie, il est dit, "mais rien de contenu dans cette section ne préjudiciera à tout re-

cours en faux, ou tout recours par requête civile après jugement, si telle signature est contrefaite.”

Dans son exception péremptoire, le défendeur a dit : La signature en question “ is not my signature, was not written by me, and was not written thereon with my knowledge, consent or authority.”—*La défense au fonds en fait*, qui contient une dénégation générale, est aussi censée dire la même chose. Si cela ne signifie pas que la signature du défendeur a été *contrefaite* ; si des termes aussi clairs sont insuffisants à produire dans l'esprit d'un juge la conviction que l'intention du défendeur a été de dire que sa signature avait été ainsi contrefaite, alors il faut renoncer à jamais pouvoir “ appliquer les règles d'interprétation applicables aux mêmes termes dans les transactions ordinaires de la vie ; ” il ne faut plus regarder comme devant suffire à la plaidoirie écrite un “ exposé de bonne foi ” des moyens que les parties veulent employer ; enfin il faut dire que le défendeur a eu tort de se reposer sur la 37e section du statut de 1849, ch. 38, car elle n'aurait pas existé pour lui : si, au contraire, le mot “ contrefait ” doit être censé compris dans les termes dont s'est servi le défendeur dans ses plaidoyers ; s'il est vrai que l'intention du défendeur a été qu'il en fût ainsi ; si ce sont des termes équivalents dont il s'est servi, il a, dans l'affidavit qui accompagne ses plaidoyers, et par conséquent l'exception péremptoire, rempli le but de la nouvelle loi, non seulement dans son esprit, mais même dans sa lettre. L'affidavit fait partie des plaidoyers, même, ce me semble, aux yeux de ceux qui seraient disposés à regarder l'affidavit comme absolument nécessaire dans tous les cas—“ La partie adverse ne peut pas avoir été induite en erreur par le dit plaidoyer sur la nature réelle et l'effet des faits qu'on a eu l'intention d'y alléguer ou de prouver d'après ce plaidoyer.” (statut de 1849, ch. 38, sect. 86).

Le législateur dans la 2e partie de la 86e section du statut, n'a eu l'intention d'établir qu'une présomption *juris* et non une présomption *juris et de jure*. La première exis-

tera en faveur du demandeur, si le défendeur qui nie sa signature, n'affirme pas cette dénégation par un *affidavit*. La signature, en ce cas, sera *présumée vraie* (ce sont les termes du statut) jusqu'à preuve du contraire. Cette preuve contraire, il doit être permis au défendeur de la faire. "Les présomptions *juris* font la même foi qu'une preuve, et elles dispensent la partie en faveur de qui elles militent, d'en faire aucune, pour fonder sa demande ou ses défenses; mais, et c'est en cela qu'elles diffèrent des présomptions *juris et de jure*, elles n'excluent pas la partie, contre qui elles militent, d'être reçue à faire la preuve du contraire, et si cette partie vient à bout de la faire, elle détruira la présomption."

Mais si la dénégation de la signature est accompagnée de l'*affidavit* du défendeur, la présomption *juris* n'existe pas; le demandeur n'est pas dispensé de faire d'abord et en premier lieu la preuve de la signature. Dans ce cas, c'est à lui à commencer l'enquête, dans l'autre, c'est au défendeur. C'est la seule différence qui existe. Le présent demandeur l'a si bien compris lui-même, qu'à l'enquête il a, le premier, fait entendre ses témoins.

Ce qui sert encore à démontrer, plus clairement s'il est possible, que le statut n'a pas établi une présomption *juris et de jure*, c'est qu'il réserve au défendeur son recours en faux. Il lui réserve ce recours sans exiger, au préalable, un *affidavit*. Ainsi, le défendeur, se contentant de son exception péremptoire ou de sa défense au fonds en fait, nécessaire en ce cas pour ne pas donner lieu à la présomption de droit établie par la première partie de la 86^e section, mais sans faire aucun *affidavit*, aurait donc pu s'inscrire en faux, et par là parvenir au même but, c'est-à-dire, prouver que sa signature avait été contrefaite.

On peut concevoir un cas où il serait impossible à une partie défenderesse qui nierait une signature, d'accompagner sa dénégation d'un *affidavit* que cette signature a été contrefaite, d'abord parce qu'elle ne connaîtrait pas

elle-même la signature de la personne que l'on prétendrait l'avoir apposée au billet, et ensuite parcequ'elle n'aurait, selon les termes du statut, ni, "agent ou commis et connaissant les faits en telle qualité," qui pût faire cet *affidavit*. Le jugement attaqué consacrant en principe qu'en l'absence d'un *affidavit*, il y a au profit du demandeur présomption *juris et de jure*, il s'ensuivrait que, dans l'hypothèse ci-dessus indiquée, la partie défenderesse serait condamnée, bien qu'elle pût prouver par témoins la fausseté de la signature. Et elle serait ainsi condamnée, parcequ'il lui aurait été humainement impossible de produire l'*affidavit* dont parle le statut.

MONDELET, Justice.—Stated in effect that the questions to be decided were:—Was the Court below right in holding that for want of the word forged or false, forged and fabricated, in the affidavit, a right had accrued to the plaintiff to obtain judgment? Was the defendant debarred from proof under the circumstance? Are the signatures shewn to be false?—He held that the Court below had misapplied the statute. The defendant had made affidavit that the signatures were not written on the notes with his knowledge, consent and authority; that he was not aware of the existence of the notes until notified of the protests—It would have been better to have used the words of the statute, but the affidavit says in fact the signatures were forged; he says "I never signed the notes; I never authorized any one to sign them."—The affidavit may not be perfectly regular, and yet not be a nullity. If the Court below held the presumption *juris et de jure*, he could not go so far. This would exclude all evidence to the contrary, which was not the intention of the statute. It was said the plaintiff had no opportunity of rebuttal, but it was not a case for rebuttal. It was an ordinary case of a signature denied. The plaintiff alleged the signature to be the defendant's, and went on to prove it,—he might have destroyed the defendant's evidence, but could not, on rebuttal, support his own case. As to the application to file another

affidavit he held it to be unnecessary, the *affidavit* as filed being sufficient.

On the one question of the genuineness or falsity of the signatures, he would only say that it was a question of evidence. He had no doubt the signatures were forged.

JUDGMENT.—1o. Considérant qu'il résulte de la preuve faite en cette cause que la signature "George Browne," qui se trouve au dos des billets sur lesquels l'action est fondée, n'est pas la vraie signature du dit défendeur appelant, que cette signature est contrefaite ; 2o. Considérant que l'*affidavit* fait et signé par le dit défendeur au bas de son exception péremptoire et de sa défense au fonds en fait, est suffisant, et répond à ce que la loi exigeait de lui en pareil cas ; qu'en décidant le contraire, et en donnant gain de cause au demandeur intimé, il y a eu mal jugé de la part de la Cour de première instance :

La Cour renverse etc., etc.

LEBLANC and CASSIDY, for appellant.

STUART, for respondent.

CIRCUIT COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1797.	{	DAGENAIS.....	Plaintiff.
		GAUTHIER	Defendant.
		vs.	

Held :—That a witness summoned to give evidence in a cause wherein the defendant was a party, in his quality of tutor to a substitution, cannot recover the amount of his taxation in an action brought against the tutor personally.

Jugé :—Qu'un témoin sommé pour rendre témoignage dans une cause dans laquelle le défendeur était partie, en sa qualité de tuteur à une substitution, ne peut recouvrer le montant de sa taxe dans une action portée contre le tuteur personnellement.

Judgment rendered the 30th. April, 1861,

In this cause the plaintiff sued to recover the amount of his tax for attendance as witness for the plaintiff in a case

of Gauthier. *de qua.*, vs. Boudreau, formerly pending in the Superior Court, Montreal. The plea was to the effect that the defendant was not liable *personally* towards the defendant, inasmuch as the suit in which the now plaintiff was summoned as witness, was not brought by the now defendant personally, but in his quality of tutor to the substitution created by the will of one Simard, in which quality it was contended he should be sued.

The Court sustained the plea and dismissed the plaintiff's action.

BETOURNAY, for plaintiff.

LEBLANC and CASBIDY, for defendant.

QUEEN'S BENCH, }
IN APPEAL.

DISTRICT OF MONTREAL.

Before :—SIR L. H. LAFONTAINE, Bt., Chief-Justice, AYLMER, DUVAL, and MONDELET, Justices.

OSGOOD..... *Appellant.*

and

CULLEN..... *Respondent.*

The parties, plaintiff and defendant, having proceeded in the Circuit Court, in an appealable case, as if the case were non-appealable, and judgment having been rendered in favor of the plaintiff, it was :

Held :—Upon an appeal instituted by the defendant, on the ground that the proceedings were irregular, the evidence not being in writing, and no articulation of facts or inscription for *enquête* or for hearing on the merits having been made, that the Court would not disturb the judgment of the Court below.

Les parties, demanderesse et défenderesse, ayant procédé dans la Cour de Circuit, dans une cause non sujette à appel, de même que si la cause eût été sujette à appel, et jugement ayant été rendu en faveur du demandeur, il fut :

Jugé :—Sur un appel interjeté par le défendeur, en raison de ce que les procédés étaient irréguliers, les témoignages n'ayant pas été pris par écrit, et aucune articulation de faits ou inscription pour *enquête* ou pour audition aux mérites n'ayant été faite, que la Cour n'infirmait pas le jugement du tribunal inférieur.

Judgment rendered 3rd March, 1860.

This was an action *en revendication* instituted in the Circuit Court at Aylmer, district of Ottawa, to recover ten tons of hay, alleged to be of the value of twenty five pounds currency, and to have been cut upon the east half of lot 12 in the 8th. range of Templeton, belonging to plaintiff, under letters patent from the crown filed in the case. On

the return day of the writ, the 25th. September, 1858, the defendant appeared and put his plea on the back of the writ, denying that the plaintiff was the proprietor of the hay, and alleging that it had been cut on the west half of the lot, belonging to one Baxter, and in possession of the defendant. An entry was then made, "plaintiff replies generally," and another entry signed by the counsel of both parties "proof 2d. May next;" then came an entry, "proof continued to 23rd. May, 1859," on which day the parties produced their witnesses who were examined, orally, as in a non-appealable case, without any notes of evidence being taken; and on the 28th. judgment was rendered in favor of the plaintiff, declaring the seizure good and valid, and condemning the defendant to deliver up the hay, within a certain delay, and in default thereof to pay twenty pounds damages.

From this judgment the defendant appealed, on the ground that the case had been conducted illegally, it being in fact an appealable case, and that there was no legal evidence upon which the Court below could give a judgment. For the respondent it was admitted that the case was, by the judicature Act of 1857, section 60, an appealable case, as being "a suit or action in which the sum of "money, or the value of the thing demanded exceeded "twenty five pounds currency," and also admitted that no articulation of facts, or inscriptions had been made; but that the appellant must be taken to have waived all objections, and be considered also as having consented to the evidence "being taken orally, as in non-appealable cases, by consent of all parties," as provided for by the 57th. section of the act, and as thereby having lost his right to appeal.

The judgment appealed from was maintained.

AYLEN, for appellant.

FENWICK, for respondent.

ROBERTSON, A. and W. counsel for respondent.

No. 2667. { MCKAY, *et al*..... *Plaintiffs.*
 { vs.
 { DEMERS,..... *Defendant.*
 { and
 { FAUTEUX..... *Garnishee.*

Held :—That a *fiere-cases* with whom the defendant had deposited promissory notes in his favor, will be ordered to deliver up the notes into the hands of the prothonotary of the Court.

Jugé :—Qu'un tiers-saisi entre les mains duquel un défendeur a déposé certains billets promissaires en sa faveur, sera contraint de remettre ces billets entre les mains du protonotaire de la Cour.

In this case a writ of attachment was issued before judgment, and the *tiers-saisi* made a declaration to the effect that, at the time of the service upon him of the writ, he had in his hands, sixty nine promissory notes belonging to the defendant, as per list produced ; which notes he declared to have been deposited in his hands by the defendant.

Judgment declaring the seizure good and valid, and ordering : " that the said *tiers-saisi* do, within three days " from the service upon him of the present judgment, " deliver up to, and deposit with the prothonotary of this " Court, the said sixty nine notes enumerated, to the deli- " very and deposit of which the said *tiers-saisi* be held and " constrained by all legal ways and means."

LaFLAMME, LaFLAMME and DALY, for plaintiff.

LECLERC, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 957. { *Ex parte*—ROBERTSON, for Ratification of title.
and
POLLOCK, *et al.*..... Opposants.

Held :—That the *péremption d'instance* cannot be invoked in the case of an opposition filed by an hypothecary creditor in a proceeding for a ratification of title, there being no *instance* pending.

Jugé :—Que la *péremption d'instance* ne peut être invoquée dans le cas d'une opposition produite par un créancier hypothécaire dans une procédure pour jugement de confirmation, en autant qu'il n'y a pas *instance* pendante.

Judgment rendered the 30th. March, 1861.

The applicant for ratification moved that the *instance* on the opposition of the opposants be declared *perimée*, and the opposition dismissed, and filed a certificate of the prothonotary that the last proceedings on the said opposition were had on the 20th. May, 1850, when the opposition was filed. (1)

Motion rejected on the ground that *péremption* could not be invoked in the case of an application for ratification of title, there being no *instance*.

ROBERTSON, for petitioner.

ROSE, MONK and HOLMES, for opposants.

(1) Authorities cited in support of motion.
Héricourt, pp. 154, 155, 156 :—3 Carré et Chauveau, question 1140 bis :—Ib.
p. 402 :—Traité des Cries p. 135.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 2007. { STODDART, et al..... Plaintiffs.
 VS.
 LEBEVRE,..... Defendant.

The defendant, in a petitory action, pleaded possession of the land in dispute by himself and his *auteurs*, and the prescription of 30 years, without alleging in his plea, or producing an *enquête*, any title in his favor, or in favor of his *auteurs* :

Held :—That, under the circumstances of the case, verbal evidence was sufficient to connect the possession of the defendant with the parties previously in possession, as his *auteurs* and predecessors.

Le défendeur, dans une action pétitoire, plaida possession de la propriété en litige tant par lui-même que par ses *auteurs*, et la prescription de 30 ans, sans alléguer dans son plaidoyer, et sans produire à l'enquête, aucun titre en sa faveur, ou en faveur de ses auteurs :

Jugé :—Que, dans l'espèce, la preuve testimoniale était admissible pour établir connexité entre le défendeur et les parties antérieurement en possession, comme ses auteurs et prédécesseurs.

Judgment rendered the 30th. April, 1861.

This was a petitory action for a piece of land in the Barony of Longueuil. The plaintiffs alleged title to the lot as having been conceded, *à titre de cens*, to Duncan Montgomery by deed of concession of 27th. October, 1809, the plaintiffs being the heirs at law of Montgomery. The defendant pleaded an exception, setting up thirty years possession by himself and his *auteurs* and predecessors, of two farms, as described in the exception, naming as such *auteurs* in possession of one of the farms, Alexis Guertin, and his heirs and legal representatives, but not naming his *auteurs* for the other farm, nor setting up any title in writing either to Guertin, or from Guertin to himself. A *défense au fonds en fait* was also filed.

It appeared from the evidence, that the piece of land in the declaration mentioned, as conceded to the plaintiff's father, was a gore or *vuide* of land of 86 arpents in superficies, between two concessions, and lying behind several of the farms fronting on the Chambly road, and amongst others the defendant's two farms. The defendant's titles to these

farms were not produced at *enquête*, nor alleged in the exception, but his witnesses spoke to the defendant's own possession of the two farms during ten to fifteen years, and of its extending across the *vuide* or gore in question. The possession of parties, anterior to the defendant, was traced from one Huot for one farm, and from the Guertins for the other, and was spoken of as extending together with the defendant's possession over from 35 to 40 years, before the institution of the action.

At the hearing on the merits, it was argued on behalf of the plaintiffs:—

1o. That the possession by the defendant of the portion of land mentioned as a continuation of the farms across the *vuide* was not proved.

2o. That without the production of a title shewing the defendant to be in the rights of the parties previously in possession of the land, the defendant could not invoke the possession of such parties, nor claim them as his *auteurs*. (1)

3o. That the defendant having failed to produce his titles to his farms, the presumption was that they were adverse to his pretensions as to the *gore* in question.

The defendant contended that the possession of the defendant and his *auteurs* for more than thirty years, was sufficiently proved, and that he had become proprietor, by prescription, and was not bound to produce any titles.

BERTHELOT, Justice :—Referred to the authorities cited from Pothier and Troplong, and held that the possession of the defendant, and the prescription of thirty years, was sufficiently proved without evidence of title under the particular circumstances of the case.

It was in evidence on the part of the defendant that he, as proprietor of the next farm, and all the other neighbors were

(1) Troplong, Prescription, no. 436 :—Dunod, Prescription, p. 20, no. 5 :—Guyot Rép. vbo. Prescription, p. 314 :—Pothier, Prescription, nos. 119, 176.

proprietors in possession of the remainder of the whole gore or *vuide* of 86 *arpents* in superficies, in rear of their farms, and had been so for more than thirty years.—And there was nothing in the evidence of the plaintiff, oral or documentary, to rebut the evidence of the defendant that he derived his right of property and possession from Guertin and his representatives, and from Huot, the individual referred to in the evidence. (1)

JUDGMENT.—“ Considérant que la seule portion ou partie
 “ de l'immeuble revendiqué par les demandeurs, et désigné
 “ en la déclaration, dont le défendeur est en possession, est
 “ désignée comme suit, savoir ; * * * et qu'il en a été ainsi
 “ en possession, tant par lui, que par ses auteurs et pré-
 “ décesseurs, les propriétaires de la terre qui a son front sur
 “ le chemin de Chambly, depuis plus de trente ans, et ce
 “ franchement, publiquement et sans inquiétation, ce qui
 “ appert par la preuve, et que, par là, il en a acquis la pro-
 “ priété par la prescription de trente ans par lui invoquée
 “ dans et par son plaidoyer, déboute la dite action avec
 “ dépens. (2)

ROBERTSON, A. and W. for plaintiff.

BEDWELL, for defendant.

(1) Authorities referred to by the Court :
 Pothier, Prescription, nos. 172, 173, 176, 177, 178.

(2) In a case No. 22, McMillan vs. Whinfield, a petitory action was brought by the plaintiff as executor to the vacant estate of Alexander McMillan, deceased, under a deed of donation to the deceased from his father, dated the 5th February, 1828.

The defendant pleaded : 1o. prescription of ten years under a title *sous seign prié* to him from one DuBale, of the 1st. February, 1843 :—2o. prescription of thirty years, without naming DuBale or any others as his *auteurs*.

At *enquête* the defendant endeavoured to trace back his possession to other parties in possession of the lot anterior to DuBale, as his *auteurs*, without producing any title in such parties, or from them to DuBale, or to the defendant. A rehearing was ordered by Mr. Justice BATHURST, on the point as to whether, in case the defendant were entitled to invoke the possession of the parties before DuBale, without any evidence of title or connexion between them, the proof of such possession, as made of record, was or was not sufficient, to shew that it extended over the thirty years :

After the rehearing, the Judge being of opinion that thirty years' possession was not made out, judgment was rendered on the 30th. April, 1861, in favor of the plaintiff, one of the motives being as follows :

“ Considérant de plus, que le défendeur n'a pas suffisamment prouvé qu'il ait été,
 “ tant par lui que par ses auteurs, en possession de cette partie du dit lot franchement,
 “ publiquement et sans inquiétation, pendant trente ans, avant la signification de
 “ la présente action, de manière à pouvoir lui en faire acquérir la propriété par la
 “ prescription de trente ans, etc.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 799.—*Exparte*—DAIGLE, for *Certiorari*.

In the Recorder's Court, Montreal, the applicant was condemned to pay a fine and to imprisonment for having sold fresh pork in his shop, within the city, contrary to the by-law of the Corporation No. 196.

Held :—That the by-law was not applicable to the case in question, such by-law only prohibiting the exposition and sale of provisions &c., in the streets, lanes, squares, and public places, other than the public markets of the City.

Dans la Cour du Recorder, Montréal, le requérant fut condamné à payer une amende et à être emprisonné pour avoir vendu du porc frais dans son magasin, dans la cité, en contravention au règlement de la corporation No. 196.

Jugé :—Que ce règlement n'était pas applicable à l'espèce, ce règlement n'interdisant que l'exposition et vente de provisions, etc., dans les rues, places, ruelles, et places publiques, autres que les marchés publics de la cité.

Judgment rendered the 30th. April, 1861.

In this case the applicant was condemned, in the Recorder's Court, Montreal, on the 7th. February, 1861, to pay a fine of twenty shillings and costs, and to be imprisoned for eight days, for having sold two pounds of fresh pork in his shop in St. Joseph street, Montreal, without the limits of the public markets, contrary to the by-law of the Corporation No. 196. (1)

The case being brought up to the Superior Court by writ of *certiorari*, it was urged on behalf of the applicant that the conviction disclosed no legal offence ; that the applicant was, by the law of the land, authorized and entitled to make the sale complained of, and that the by-law was not applicable nor intended to be applicable to cases of sales in shops, or if so intended was unjust and illegal, and the Court below had no jurisdiction to enforce it.

JUGEMENT.—“ Considérant que le règlement No. 196, . . .
“ ne prohibe pas la vente de provisions fraîches, et en par-

(1) The by law under which the conviction took place is as follow :

“ Que personne ne vendra désormais ni n'exposera en vente dans ou sur aucune rue, place, ruelle ou autre place publique de cette cité, que sur un des susdits marchés publics, aucune espèce de provisions fraîches, de la viande de boucherie, du porc, de la viande salée, des dindes, des oies, des canards, des volailles, des œufs, du poisson, des fruits, des végétaux, du fourrage, du foin, de la paille, du grain d'aucune espèce, des animaux vivants, des chevaux, des bestiaux, des moutons, des veaux, des cochons, ou autres animaux, produits ou effets généralement apportés et vendus sur les marchés publics.”

"ticulier du porc frais dans les maisons et résidences de
 "particuliers, et qu'il n'en prohibe l'exposition et ventes
 "que dans les rues, places ou ruelles, et autre places pu-
 "bliques, autre que les marchés publics de cette cité, et
 "par conséquent qu'il y a erreur dans le dit jugement, le
 "casse, annulle et met au néant avec dépens."

DEVLIN, for applicant.

PAPIN, for the corporation.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE. }

Before:—SIR L. H. LaFontaine, Bart., Chief-Justice,
 AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

HEARLE..... *Appellant.*

and

DATE..... *Respondent.*

Held:—In an action *en revendication*
 of moveables :

1o. That the son of the plaintiff, is
 not a competent witness for his father

2o. That where a party is asked on in-
 terrogatories *sur faits et articles* whether
 he has not received the originals of cer-
 tain letters, addressed to him by the ad-
 verse party in the suit, it is irregular to
 produce other letters not inquired of.

3o. That where goods are seized by re-
 vendication on the premises formerly oc-
 cupied by the plaintiff and defendant
 as copartners, and no proof is made of a
 demand or of a refusal to deliver them
 up, and the goods are delivered to the
 plaintiff under an interlocutory order of
 the Court, the defendant alleging by
 his plea that he never claimed the goods,
 and praying *acte* of his willingness to
 deliver them; the plaintiff's action will
 be dismissed with costs, it appearing
 that the seizure was made without neces-
 sity.

Jugé:—Dans une action *en revendica-*
 tion de meubles :

1o. Que le fils du demandeur, est inco-
 pétent comme témoin pour son père.

2o. Que lorsqu'il est demandé à une par-
 tie par interrogatoires *sur faits et articles*
 s'il n'a pas reçu les originaux de certaines
 lettres, à lui adressées par la partie adverse
 dans la cause, il est irrégulier de produire
 d'autres lettres dont il n'est pas question.

3o. Que lorsque des effets sont saisis-re-
 vendiqués sur les lieux ci-devant occupés
 par le demandeur et le défendeur comme
 associés, et que nulle preuve n'est faite
 d'une demande ou d'un refus de les livrer,
 et que les effets sont remis au demandeur
 en vertu d'un jugement interlocutoire de
 la Cour, le défendeur alléguant par son
 plaidoyer qu'il n'a jamais réclamé les
 effets, et demandant *acte* de ce qu'il est
 prêt d'en faire la livraison; l'action du
 demandeur sera renvoyée avec dépens, en
 autant qu'il appert que la saisie a été
 faite sans nécessité.

Judgment rendered the 1st. June 1861.

This was an action *en revendication* brought by the ap-
 pellant against the respondent, to recover certain movea-
 bles.

The declaration set up that the effects claimed came into the possession of the respondent after the 20th. of January, 1860, and that he refused to restore the same to the appellant.

The defendant pleaded that he had no interest in the articles claimed by the appellant, and had never claimed the same or refused to deliver them to the respondent, that the store had been leased to the partnership of Hearle and Date, (composed of the appellant and respondent) who carried on business under articles of co-partnership dated 22nd August, 1853, passed before notaries.

That on the 19th. January, 1860, the appellant, of his own accord, dissolved the said co-partnership, and that the articles seized had for a long time been in the said shop, without any claim of property whatever on the part of the respondent, who never objected that they should be taken away by the appellant, and formally consented that they, and each of them, should be removed by the appellant at his costs and charges.

By the conclusions he prayed *acte* of his declaration and offer, and concluded that the appellant be condemned to pay all the costs of the action.

The appellant in his answer prayed *acte* of the respondent's declaration that he did not claim the said effects, and also prayed for a condemnation against the respondent for costs.

On the 22nd March, 1860, the respondent, on affidavit, moved for *acte* of the declaration by him then and theretofore made, that he consented to the removal of the effects seized, and that the appellant be held to remove the same within a delay to be fixed by the Court; and on the 23rd the appellant moved praying for *acte* of this declaration, and that the sheriff be ordered to deliver the effects seized to him. The latter motion was granted, and by judgment rendered on the 23rd of March, the sheriff was ordered to deliver the property seized to the appellant.

At the hearing on the merits the respondent moved to revise a ruling at *enquête*, on an objection entered to the examination of James G. Hearle, a son of the appellant, and to reject his deposition from the record, and also to reject certain papers which the appellant had produced with his answers to the interrogatories submitted to him, on the ground that they had not been inquired of, and were illegally and irregularly filed.

The appellant was asked whether certain letters, copies of which were filed, had been sent to him by, and received from, the respondent. Other letters sent to the appellant and the appellant's answers thereto were produced with the answers to the interrogatories.

On the 30th April, 1860, the Court, Monx, Justice, rejected the deposition of the plaintiff's son as being an incompetent witness, he rejected also the letters referred to :—
 “ Considering that it appears from the proceedings and evidence of record in this cause that at the time of the seizure in this cause made, the property and effects in this cause seized were in and upon the co-partnership premises of the said plaintiff and defendant, and in the joint possession of the said plaintiff and defendant, and considering that it is not established that the defendant, previous to the issuing of the process of revendication, or at any time, had refused to allow the said property and effects to be removed by the plaintiff ; and that the defendant has so declared in his plea : Doth maintain the defendant's said plea, and doth dismiss the plaintiff's action with costs.”

On appeal from the judgment it was urged on behalf of the appellant :

That the judgment was erroneous and unjust, the appellant having a right to legal recourse to recover his property.

That this right was not affected in any degree by his having another action against the respondent arising from

the late copartnership. That the absence of a demand for the particular property anterior to the seizure did not determine the question of property, nor preclude the plaintiff from his action.

For the respondent it was contended : That the seizure was vexatious and unnecessary, and was not preceded by any demand or refusal, that the goods were never claimed by the defendant and were worthless, and had been put away for years in the garrett of the shop occupied by the partnership, until within a few days.

Judgment of the Superior Court confirmed.

MONDELET, Justice, dissenting.

CROSS and BANCROFT, for appellant.

A. and W. ROBERTSON, for respondent.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
APPEAL SIDE.

Before :—SIR L. H. LaFontaine, Bart., Chief-Justice,
AYLWIN, DUVAL, MONDELET and BADGLEY, Justices.

PREVOST, *et al.* *Appellants.*
and

ALLAIRE, *Respondent.*

A charitable institution, formed for the relief of the poor, appointed delegates to establish a Savings' Bank. These delegates elected a president and directors who adopted certain regulations, and among others, one prohibiting any profit to the officers of the institution. Deposits were received, to be repaid with interest, and promissory notes were discounted upon the credit of individuals. Upon these discounts a *per centage* was taken by the directors, and a portion of the funds was appropriated to their own use for their services. The bank or business, so established, was ultimately closed, as being insolvent, and a portion of the debts, due as special deposits,

Une institution charitable, formée pour secourir les pauvres, nomma des délégués pour établir une Banque d'Épargne. Ces délégués élurent un président et des directeurs qui adoptèrent certains règlements, et entr'autres un règlement interdisant tout profit aux officiers de l'institution. Des dépôts furent reçus pour être remboursés avec intérêt, et des billets promissaires escomptés sur la responsabilité personnelle des individus. Sur ces escomptes un *per centage* fut perçu par les directeurs, et une portion des fonds fut appropriée à leur usage en paiement de leurs services. La banque, ainsi établie, fut finalement close, comme insolvable, et une partie des

were bought up by the directors at a composition in the pound.

Held :— In an action of *assumpsit* against the president and several of the directors, brought by one of the depositors, who had been one of the above mentioned delegates, for the full amount of his deposits:

10. That, without reference to the question of fraud, *délit* or *quasi délit*, the president and directors had become traders by mixing themselves up with a commercial banking business, and were, jointly and severally, liable to each depositor, for the amount of his deposits. And that had the plaintiff approved of the proceedings of the directors, submitted annually at meetings of the depositors, his approval, obtained by means of false statements, could not operate to his prejudice.

20. That the charitable institution had no interest in the matter, and consequently that no action of account, *pro socio*, for or against it would lie.

30. That the president and directors had become a copartnership, or an unincorporated company, and that the action was properly brought against any one or more of them, under the provisions of the 12th Vict., ch. 45.

dettes, dues comme dépôts spéciaux, fut rachetée par les directeurs à tant dans le louis.

Jugé :— Dans une action d'*assumpsit* contre le président et plusieurs des directeurs, intentée par l'un des déposants, qui avait été un des délégués sus-mentionnés, pour tout le montant de ses dépôts :

10. Que, sans égard à la question de fraude, de *délit* ou de *quasi délit*, le président et les directeurs étaient devenus commerçants en s'immisçant dans une affaire de banque d'une nature commerciale, et étaient, conjointement et solidairement, responsables envers chacun des déposants, pour le montant de ses dépôts. Et que si le demandeur avait approuvé des procédés des directeurs, soumis annuellement aux assemblées des déposants, son approbation, obtenue au moyen d'états faux, ne pouvait opérer à son préjudice.

20. Que l'institution charitable n'avait aucun intérêt dans la chose, et conséquemment qu'aucune action en reddition de compte ne pouvait être dirigée contre elle.

30. Que le président et les directeurs étaient devenus une société, ou compagnie non incorporée, et que l'action était bien dirigée contre l'un ou plusieurs d'entr'eux, en vertu des dispositions de la 12me. Vict., ch. 45.

Judgment rendered the 20th. June, 1861.

Three appeals were instituted from a judgment of the Superior Court at Quebec, condemning the appellants, Louis Prevost, Augustin Gauthier, junr., Philippe Brunet and Louis Marois, to pay the respondent the sum of £165 13 7, with interest at the rate of 4½ per cent, and costs.

The appellants were sued as having carried on the business of bankers, under the firm of *Caisse d'Economie de St. Roch*, trading at the city of Quebec as such. In the declaration they were stated to be copartners, and liable with others for the above amount deposited by the plaintiff, Etienne Allaire, as a depositor in the bank. The contract declared upon, to which was added the money counts, was the lending of the above sum, to be repaid on demand, after ten days notice

The defence to the action, on the merits, was a specific

dénégation that the defendants were copartners in the bank. That on the 3rd. of March, 1848, there existed the society of *St. Vincent de Paul*, of which the plaintiff was a member, established for the benefit of the poor ; that at a meeting of a section of this society, the plaintiff was named a delegate to establish the basis of a Savings' Bank ; that at a meeting of delegates, the plaintiff being present, it was resolved that a Savings' Bank should be established, under the auspices of the society, at St Roch's ; and that the five sections of which it was composed, should each elect ten members to be founders of a *Caisse d'Economie de St. Roch*. That the plaintiff was named a delegate from his section, and that the fifty members named three persons from each section to be directors. That on the 24th. of March, 1848, the directors met and organised the bank, according to a plan adopted by them. That one of the regulations established was, that the bank should furnish each depositor with a pass book containing the regulations of the bank, signed by the president and directors, and that the pass-book contained a provision " that no member " or director of the said bank should have the right of de- " riving any pecuniary advantage whatever from the funds " of the said bank, but that every surplus should serve to " form a reserved fund to cover losses and to augment the " rate of interest on deposits." That the bank was purely a benevolent institution, from which the founders were to receive no benefit ; that the defendants received none ; that with all this the plaintiff was acquainted, and he was cognizant of the business of the bank and approved of it.

A special answer to this defence was that the Society of *St. Vincent de Paul* possessed no legal character ; that it was composed of persons who met together and furnished means for the relief of the destitute poor ; that they never did form a Savings' Bank, but that their name was assumed by the defendants to procure a credit from the poor and industrial classes ; that the defendants were borrowers and lenders of money and traded in it ; that there was no accoun-

tability in the Society of *St. Vincent de Paul*, and that the depositors acted individually and not as members of it. That the condition on the pass-book, as above pleaded, was illusory and put there to cheat and defraud the public, while the defendants were using the money of the depositors to their own profit. That the condition was expunged from the pass-books in 1853. That it was notorious that the defendants were dealing in the funds of the bank which they withheld from the poor, who had deposited their money, and were using it to purchase up for their own use the pass-books at a depreciated valuation, varying from seventeen shillings to two shillings and six pence in the pound, regulated by the misery and distress of the depositors.

To this answer (a demurrer to it was reserved) a replication was filed, repeating some of the matters already pleaded, alleging a crisis and a run on the bank, that the securities of the bank could not be realised, that the defendants acted openly and in good faith, that their proceedings were submitted to the depositors, including the plaintiff, who approved of them, and that he was the cause of the panic and the ruin of the bank.

Although the defendants pleaded separately the defence was substantially the same.

On proceeding to evidence the plaintiff proved that his pass-book was balanced on the 18th April, 1855, and £165 13 7 then carried to his credit by Brunet. This pass-book had the conditions printed upon it, that the directors should receive no profit, and that the depositors should give ten days notice before withdrawing their deposits. The plaintiff produced the pass-book for 1853, shewing that the condition, as to profits or pecuniary advantage from the bank, was then dropped. That the office for conducting the business of the bank was situated at St. Roch's, that before April, 1854, (as shewn by an exhibit of the defendants) the bank received from depositors £88,168 6 7, that the plaintiff's money, with that of others, went under the control of

the defendants, that they discounted notes upon the personal security of individuals, that in 1848-49 Mr. Paradis and Prevost, Gauthier and Brunet were, or shortly afterwards became, directors. That one of the earliest transactions of the bank was the discounting of five or six promissory notes, amounting to above £3000, for Mr. Alford, upon which eleven per cent was exacted, five for the president, Paradis, or his partnership concern, and six for the bank. That Prevost, who succeeded Mr. Paradis as president, received, for himself, a commission amounting to as much as five per cent upon the discounting of notes with but three months to run. That Bilodeau & Co. and Mr. Thornton Smith obtained discounts, the former to the amount of £10,000, upon which Prevost received a commission. Smith stated his discount to have amounted to £1000 or £1200, and that Prevost charged him for the most part five per cent for three months, and sometimes five and a half, above legal interest. That this was in the years 1853-4.

Mr. Prevost, examined on oath, says, "I never demanded
 " or exacted a commission or recompense for having dis-
 " counted notes with the bank funds, but I received, in
 " certain cases, an indemnity for my time, &c." Upon
 being asked if it was understood before the making of the
 loans, that he should receive an indemnity for his services,
 he says. "I think so in some instances, for leaving my own
 " duties, but I consider the indemnity so given by the par-
 " ties as a matter altogether between the party and myself,
 " in which the bank had no interest." Mr. Prevost states
 also as follows: "It is to my knowledge that Mr. Marois
 " purchased the claims against the bank with the moneys
 " of his partnership with Mr. Lepage, under the name of
 " Marois & Lepage, with the understanding that he, Marois,
 " should be reimbursed his advances, out of the funds of
 " the bank, with interest, agreeing, on his part, to leave to
 " the profit of the said bank the profits of his purchases.
 " He made these purchases, as well in the interest of the
 " depositors as in that of the bank, at as high a rate as

" the means of the bank seemed to shew, (*sic*) principally to meet the pressing wants of the depositors, and to prevent the sacrifice of their claims in the hands of speculators, so great was the alarm among the depositors at the time the bank suspended. He has been reimbursed out of the funds of the bank, but he is still considerably in advance." At the taking of the evidence, the defendants, after notice, refused to produce the books of the bank. Mr. Paradis who was examined by the defendants, proved the nature of the society of St. Vincent de Paul; he said " it is not necessary to subscribe any sum of money whatever to become a member of the society, the subscriptions are made by a collection (*quête*) at each meeting, when persons give what they choose, and the amount is distributed among the poor by the members." It was also proved that the management of the business of the bank was in the hands of the defendants from March, 1852, to February, 1856, when the bank suspended payment. Several witnesses proved that discounts were made upon notes payable to the order of Brunet. That at the office of the bank where the plaintiff, after the suspension, gave notice that he wanted his money, Marois and Brunet stated that they had in hand £14,000. As to the purchase of claims by Marois, and the nature of the business, this appears from the evidence of Mr. Dufresne, advocate, who was entrusted with an examination of the books after the suspension in January or February, 1856, by Prevost and Brunet. He swore that the books shewed the business to be that of a bank, that is, the receiving of deposits and the discounting of notes. That he himself had a claim for £80 and upwards, which he sold to Marois for £75; that there was a meeting of the depositors, held after his examination of the books, at which Prevost, Brunet and Marois attended, and promised to pay a dividend soon. Marois stated to this witness that he was purchasing the claims on his own account.

The defendants, by their evidence, established that the plaintiff was one of the members of the society of *St. Vin-*

cent de Paul, and that he was one of the persons chosen by the different sections to lay the basis of a Savings' Bank. The proceedings of the directors, contained in a quire of foolscap, were produced by them, shewing the plan upon which it was originally intended that the business should be conducted. This plan, adopted by the directors in 1848, contained the regulation that the officers should receive no pecuniary advantage from the bank. The election of Marois appears by this book to have taken place on the 13th. of March, 1852, when Brunet, Prevost and Gauthier were elected, with some others, these three being then in office and called a discount committee. The first directors appear in this document to have been Messrs. Paradis, Lefevre, Prevost, Gauthier, Huot, Paquet, Martel, Brunet, Guilmet, Dubois, Blais, Lapointe, Davidson and Laberge. Paradis was president, and Gauthier secretary. The last election of directors, as ascertained from this book, seems to have been that including the four defendants as above mentioned in 1852, this being the last entry of the proceedings. This document, in the hand writing of Gauthier, shews that there were taken out of the funds of the bank, for his services, on the 12th. April, 1851, the sum of £25, at a subsequent period a further sum of £25, on the 3rd. of May, 1853, the sum of £55 16s. was paid to the officers Brunet, Prevost and Gauthier, and on the 26th. April, 1854, the sum of £75 was taken by Prevost, Gauthier and Brunet, for their services. The witnesses of the defendants state how the bank was founded, that fifty members were named for the purpose, that these fifty members, composed of ten from each section, elected three directors, forming in the whole fifteen, that the plaintiff voted upon the first choice of directors. That the directors acted for one year, and to be renewed every year, that the directors deposited the deposits in the other banks where they received from three to three and a half per cent on them. That general meetings of depositors were called annually, to receive statements of the affairs. Mr. Martel,

one of the first directors, states : " That at the meeting of
 " the fifty members the directors made their report upon
 " the general state of the affairs, and these members were
 " supposed to be present. The fifteen directors acted by
 " fives at the receiving of deposits, and acted conjointly,
 " when they were convoked for an assembly of directors,
 " that is to say, five did the active duty during four consecutive months, at the end of which they were replaced
 " by five others. By an active part I mean that they
 " received the deposits and entered them in the books.
 " While I was a director the bank discounted notes.
 " The directors named to discount were the three officers, the president, secretary and treasurer. The first
 " president, I believe, was Mr. Paradis, but I cannot recollect if, in that year, notes were discounted. The president who replaced him was Mr. Louis Prevost who, to
 " the best of my knowledge, has always been one of the discount committee. Mr. Gauthier has always formed
 " one of the said committee, and, I think, Mr. Brunet did not come into it until after the decease of Joseph Lefevre,
 " some months after my resignation. It was understood
 " by the directors, who named the discount committee, that the rate of discount should be six per cent, and it
 " was, moreover, agreed that no note should be discounted
 " without having, as security, besides a good endorser, *coupons* and debentures of the corporation of the city of
 " Quebec, or of the government, to an amount equal to
 " twice the amount of the note ; the last condition, to the
 " best of my knowledge, and the resolution to that effect,
 " must be inserted in the book of the minutes. It is not to
 " my knowledge personally, that the bank discounted
 " notes at a higher rate than six per cent. It is not to my
 " knowledge either, personally, that any of the directors
 " received commissions for discounting notes, and none
 " of the directors told me so. Before retiring I examined
 " the books, this examination was not satisfactory to me,
 " for this reason, that I perceived that all the entries were

“not made, I mean to say that I never saw an account of
 “the promissory notes. This examination was made has-
 “tily by myself, but the additions made by the secretary
 “and book-keeper showed, at the time, a profit of £100
 “for the depositors. It was then that I ascertained that no
 “special and detailed account of the promissory notes was
 “kept, and that the condition imposed by the directors to
 “take security in debentures of the government, and of
 “the corporation, was not observed. It was, moreover, very
 “difficult to see the notes remaining in the hands of Mr.
 “Prevost, who did, I think, the work of three of the com-
 “mittee. The two defendants Gauthier and Prevost were
 “directors of the bank from the beginning of it until
 “the end, &c.”

The judgment of the Court below, of the 5th. of April, 1860, was as follows :—

“The Court having heard the plaintiff, Etienne Allaire,
 “by his counsel, the defendants not appearing by their
 “counsel, and having examined the pleadings and evidence
 “in the cause, and maturely deliberated thereon, and it
 “appearing that the defendants in the said cause, at, before
 “and after the thirteenth day of April, in the year of our
 “Lord one thousand eight hundred and fifty-five, at the
 “city of Quebec, were associated as partners in a bank or
 “banking institution known under the name, firm and style
 “of *Caisse d'Economie de St. Roch*, and there carried on the
 “business of banking by the discounting of promissory
 “notes and otherwise; it appearing also that on the day and
 “year aforesaid, the said defendants had, in the ordinary
 “course of business of the said defendants, as such bankers,
 “received from the plaintiff, a deposit of one hundred and
 “sixty pounds thirteen shillings and seven pence, current
 “money of this province; it appearing also by a certain
 “account or pass-book, in the handwriting of one of the
 “said defendants, which was delivered by the said defen-
 “dants to the plaintiff, that the defendants had agreed to
 “pay interest on the said money to be computed at the rate

“ of four and a half per cent per annum, and that the trans-
 “ action between the plaintiff and the said defendants,
 “ amounts to a letting and hiring of money on a loan at
 “ interest ; it appearing also, that after the deposit aforesaid,
 “ to wit, from and after the month of February, one thou-
 “ sand eight hundred and fifty-six, the said defendants
 “ closed the said bank, and have, thenceforward hitherto,
 “ refused to pay the depositors in the said bank, including
 “ the said plaintiff, the monies deposited by them ; it ap-
 “ pearing also, that the allegations contained in the pleas
 “ of the said defendants, respectively, are insufficient in
 “ law, and unfounded in fact, and, more particularly, the
 “ allegation that they are not liable as bankers, by reason
 “ of the said bank or banking institution having been formed
 “ at the request of a benovolent society known as “ *La So-*
 “ *ciété de St. Vincent de Paul,*” and also the allegation that
 “ the said defendants received no personal benefit and
 “ advantage from the said bank as the same was established
 “ for the benefit of the poorer classes ; and on the contrary,
 “ it appearing that Louis Prevost, one of the defendants,
 “ was permitted and allowed to trade with the monies of
 “ depositors in the said bank for his own personal profit
 “ and advantage, and that Louis Marois, another of the
 “ said defendants, has been occupied in purchasing the
 “ claims of the said depositors in the said bank for
 “ monies therein deposited by them at a reduced price,
 “ upon the representation that the said bank or banking
 “ institution, known as the *Caisse d’Economie de St. Roch,*
 “ and composed of them the said defendants, is insolvent
 “ and unable to pay its just debts ;—this Court doth con-
 “ demn the said Louis Prevost, Augustin Gauthier, Junior,
 “ Philippe Brunet and Louis Marois, jointly and severally,
 “ to pay and satisfy to the said plaintiff, the said sum
 “ of one hundred and sixty-five pounds thirteen shillings
 “ and seven pence, with interest from the said thirteenth day
 “ of April, in the year of our Lord one thousand eight hun-
 “ dred and fifty-five, at the rate of four and a half per cent
 “ per annum till paid, and costs of suit.”

Three separate appeals were instituted from this judgment, one by Prevost, one by Gauthier and Brunet, and a third by Marois.

For the appellant Prevost, it was contended that the contract between the parties was one of partnership, of which the respondent Allaire was a member, that he must bear a share in the profit and loss, and that his remedy was by an action of account arising from the co-partnership; that this appellant, if he did make a profit out of the monies of the bank, made them as a private individual, and not as a director, and that the appellant was not a director at the commencement of Allaire's deposits.

For the appellants Gauthier and Brunet, it was contended also that the association termed the *Caisse d'Economie de St. Roch*, was not a commercial company, but an *association civile*, in which the members were not jointly and severally liable; that the appellants, from the nature of their occupations, were not merchants or traders; that the association was composed of fifty members, the founders, and their action could not be brought against the defendants, who were the directors, *gérants*, and the latter could not sue in their name. That the plaintiff, Allaire, as one of the founders of this *association civile*, had no direct action against the defendants, but the action *pro socio*, or to obtain an account. That the defendants had acted as the delegates of a benevolent society, without any hope of profit personally, and if they had exceeded their powers, the respondent could compel them to account. That the position of Brunet and Gauthier was different from that of Prevost and Marois, as they never purchased up the claims of the depositors, nor sanctioned their conduct.

For the appellant Marois, it was contended that Allaire's money was deposited in December, 1853. That this appellant never acted in any way in the bank until 1855. That he never accepted the office of a director, but acted only as a deputy or employé of one of its officers for a short

time after the 1st. January, 1855. That the partnership known under the name *La Caisse d'Economie de St. Roch*, was composed of the depositors of money therein. That Allaire was one of the members of the partnership. That the officers of the partnership were but the *mandataires* of the partners. That the respondent could not bring an action against the defendants as having carried on business in partnership with others, not disclosed in his declaration, when he himself was one of the partners of the partnership so sued. That there was no act of Marois' which in law would constitute him a partner, and that as respected the purchase of claims, these purchases were not proved to have been made before action brought.

For the respondent, it was contended that the Society of *St. Vincent de Paul* being, beyond all question, merely a charitable association for the support of the poor, the nomination of the fifty persons to organize a savings' bank was only to encourage the poor classes to lay aside their small earnings to provide for their wants ; that the intention was to establish a savings' bank, with the guarantees to the public, established by the Provincial Statute, 4 and 5, Vict., cap. 32. That no savings' bank was ever established, but, on the contrary, a deceptive institution was organized, upon a plan adopted by the directors first chosen, which did not appear ever to have been communicated to the society of *St. Vincent de Paul*, or the fifty delegates, and that it was never sanctioned or approved of by them. That it was not approved of by the depositors, beyond the conditions printed on the pass books ; that it was only at the commencement that the mere form of election of directors took place ; that the subsequent elections were irregular, and nothing but the perpetuation of the powers of the persons who had drawn into their own hands all the funds and dealt with them for their own profit. That the defendants having monopolised the whole power, three of them being, not only directors, but president, secretary and treasurer, for four years previous to the suspension, derived personal

profit from the association. That the last entry in the plaintiff's pass-book, being one of April, 1855, two years after the election of three of the defendants, and the nomination of Marois, and all having assumed and conducted the whole business from 1852 to 1856, when the suspension took place, receiving a profit in the proportions settled among themselves, shows clearly that they were co-partners in a banking concern. If Prevost received a commission from five per cent to a half per cent upon notes of but three months to run, and the other respondents signed the cheques for the discounts, which they did, the acts of Prevost were the acts of all, and it was not for the respondent to show how they settled the profits among themselves. While Marois was a director, the condition prohibiting the receipt of pecuniary advantage by the officers was expunged. A new organization was therefore established to cover the cases of directors trading upon the monies, and of the other officers receiving pay for their labor. When the election of directors ceased in 1852, (supposing that the original plan of a Savings' Bank had been honestly carried out, down to that time, which was not the case) then the appellants, by discarding the system of elections, and taking the whole of the funds into their possession, became an unincorporated company for trading purposes, that is for banking. The whole course of the proceedings of the company or bank, from its beginning until its suspension, shewed that the countenance of the society of *St. Vincent de Paul* was obtained to induce the poorer classes to part with their money to be turned to the use of Messrs. Paradis, Prevost, Gauthier and others. Marois, traded upon the misery of the poor depositors for the benefit of himself; that it was for the bank, as the defendants pretend, was out of the question, as there was no bank in which the depositors had any share, the instant they sold their pass-books, they came to be excluded by the sale, and supposing that the defendants had succeeded in buying out the claims of all the depositors there would have been no other proprietor of the funds of the bank.

then the purchaser or purchasers—Marois and others. As respected the pretension that an action could be brought against the fifty delegates,—no action could be brought against them or the society of *St. Vincent de Paul*, any more than against the citizens of Quebec holding a public meeting and approving of the formation of any public enterprise ; these fifty persons had no pecuniary interest in the matter, and incurred no personal responsibility.—The depositors did not form portion of any company, they did not elect the directors, and these directors did not act as their attorneys, but entered into an express contract with the persons composing the *caisse* or bank, whoever they might be, that they would return sums lent with interest in consideration of the use of them ; that the money awarded in the court below to the respondent, was money had and received to his use by the defendants, who, in his pass-book, in 1855, admitted his balance to be £165 13s. 7d. The French and English law admits of co-partnerships being formed without any express agreement or writing. The mere acts or course of dealing of parties will constitute a co-partnership and an unincorporated company. That the contract between the depositor and the banking company was a loan for the use of the defendants, or the company of which they formed part, by which the plaintiff in the Court below transferred to the company, or bank, the property in a sum of money in consideration of there being returned to him a like amount.

The following are the grounds and authorities submitted in support of the judgment in the Court below.

10. That the *Caisse d'Economie*, termed the savings' bank of St. Roch, was not a saving's banks because none of the provisions of the 4 and 5 Victoria, cap. 32, had been complied with, these being essential to the existence of a savings' bank in Lower Canada ; but on the contrary, that an unincorporated company, in copartnership for banking purposes, had been formed, the members of which were

self constituted and derived a profit from the business, and became therefore liable for its debts (1).

20. That the contract between this unincorporated company or partnership was a loan known in the french law as the *prêt de consommation, mutuum*, which is thus defined by Pothier. "Le contrat de Prêt de consommation est celui qu'on appelle *mutuum*. On peut le définir un contrat par lequel l'un des contractans donne et transfère la propriété d'une somme d'argent ou d'une certaine quantité d'autres choses qui se consomment par l'usage, à l'autre contractant, qui s'oblige de lui en rendre autant (2)."

30. That there was no partnership between the society of St. Vincent de Paul or its delegates and the directors of the bank. The society was purely a benevolent institution, it had no interest in and derived no profit from the business, and there were no matters of account between it or its delegates and the directors, and they had no right, therefore, to ask for an account of the business from the directors, and as respected the pretension that a partnership existed between the directors and the depositors, the nature of the contract negatived any thing of the kind, the terms of which were that upon a deposit of so much money the same would be returned on demand, after ten days notice, with interest at the rate of 4½ per centum per annum. The depositors, therefore, were to suffer no loss, and, as respected profits, there was no promise that they should receive any. If profits were made, after the payment of interest to depositors, these could not go to the latter. Depositors made their deposits

(1) "Par le droit la société peut se contracter par le seul consentement des parties, sans écriture. *Ius. de oblig. ex consensu, in princ.* Il y a même quelquefois des sociétés tacites, qui ont le même effet que celles qui sont établies par contrat, quoiqu'elles ne soient présumées que par les circonstances et les conjectures; comme si deux personnes ont négocié ensemble, et après la négociation l'un des associés a vendu quelque chose dépendant de la société; si tous deux ont assisté au compte qui a été fait avec leurs créanciers; si la société a été reconnue en jugement; si l'un ont habité ensemble, joui et fait valoir le bien d'une commune main, et autres conjectures qui peuvent induire une société." *Gotsfred ad Leg. si fratres, § pro soc. — Vide 2 Bornier upon the Ordinance of 1667, p. 466, tit. 4, des Sociétés art. 1, also 17 Duranton, nov. 335-6-7; — Story on Partnership, p. 119, § 86; — Collyer p. 3.*

(2) *Traité du contrat de Prêt de Consommation*, Nos. 1, 18, 23, 27, 35; — Story, *Ballments*, p. 95, § 86.

one day, and others withdrew them, old accounts were closed and new ones opened, so that the body was continually changing, but the directors remained the same. The profits could therefore have been retained by the directors, and if any demand had been made for them by the depositors the answer would have been "we have paid or are ready to pay you your principal and interests, you agreed for so much and you can get no more."

40. That by the act 12 Victoria ch. 45, intituled: "An act to facilitate actions against persons associated for commercial purposes, and against unincorporated companies:" the directors should have filed with the prothonotary of the Superior Court, and with the registrar of the county, a declaration in writing of the names of the persons who carried on the business of this bank, and their not having done so rendered any one or more of them liable, as stated in the respondents declaration in the Court below.

BADGLEY, Justice, *dissenting*:—The circumstances in connection with this case, the number of claims awaiting the final decision on this one, the loss of their deposits incurred by a number of poor persons, and the probable ruin of the appellants from an unfavourable judgment against them, naturally require that minute care and attention should be given to the case itself, and that an utter absence of feeling should prevail in its investigation. There are three appeals, moreover, and they have arisen from the judgment of the Superior Court in this suit, instituted by Allaire, the respondent, as plaintiff, against Gauthier and the other appellants as defendants, for the recovery from them of a sum of money and interest thereon, and for which he demanded their joint and several condemnation in his favour, upon the grounds set out in the counts of his declaration. These are in the common form used in practice, namely: the first declares against the defendants for that "they, on "and before and since the 30th. of April, 1855, were "jointly, with other persons, associated as partners for trad-

ing purposes, at Quebec, under the name and firm of *Caisse d'Economie de St. Roch*, and then and there carried on the "business of bankers, and as such partners and bankers" received in loan from the Plaintiff £165 13 7, which they agreed to pay him with 4½ per cent interest, after 10 days notice duly given on the 19th. January, 1855. The 2nd count charges their indebtedness as of the 19th. June, 1856, *being such partners traders and bankers*, under the money, interest and account stated counts. The 3rd count charges the defendants with a loan on the 30th. April, 1855, of the above sum, which they and the other persons aforesaid agreed to pay to plaintiff as in first count. Then follow the money counts, for money lent and advanced &c., the common breach with conclusion against the defendants for their joint and several condemnation: to the first and second counts is also added the allegation that the defendants had not made delivery of the declaration of their association, as required by the statute in such case. The plaintiff's action thus settled by himself is in common assumpsit form against the defendants, as partners, traders and bankers, trading together at Quebec, under the firm of the *Caisse d'Economie de St. Roch*, and as such making the alleged contract with the plaintiff. The complication in this case has arisen from the pleadings, and first from the severance by the defendants in their pleas, which however they could not otherwise do without appearing to admit the partnership and trading qualities imputed to them. Without adverting to the preliminary pleadings which were disposed of by the Superior Court, their defences upon the merits present a general similarity to each other, as well in substance as character. Taking issue with and denying the facts and allegations set out by the plaintiff, they rest their defence upon the circumstances connected with the plaintiff's acts from the formation of the *Caisse d'Economie de St. Roch*, inclusively down to the institution of the action. They state as matter of fact, that in 1848, a charitable association, called the society of *St. Vincent de Paul*, existed in the parish of St. Roch, and was divided into five sections or *conferences* for carrying out its work of

charity. That the leading men of the parish seeing that the larger portion of the parishioners consisted of mechanics, shipwrights &c., whose means of subsistence were precarious, suggested to the conferences the propriety of establishing a *Caisse d'Economie*, in aid of the society, to receive and put aside the savings of these people; that the suggestion was adopted by the conferences, who each selected 10 of their number who should assemble together and carry the suggestion into effect. The plaintiff, a member of the conference of *St. Louis de Gonsague*, was one of the ten elected by that conference, and with the other delegates from the other four conferences did in fact organize and establish the institution under the name of the *Caisse d'Economie de St. Roch*, as for and with a charitable purpose and character, that these delegates appointed themselves to be its permanent founders, chose three from each delegation, making fifteen in all, as its directors, and charged five of the fifteen, one from each conference, to assist in turn for a period of four months to act as such directors in the active business of the *caisse*. In addition to the direction, officers consisting of a President and his Vice, a Treasurer and a Secretary with assistants to act for the two latter in case of their absence, were also appointed; and that rules and regulations for the guidance and information of parties interested, depositors and the public in general, were adopted and required to be inserted in the deposit books to be issued to the depositors: it is also stated that the *Caisse d'Economie de St. Roch* was set into operation with the participation of the plaintiff, that its proceedings were public and open, and known and acquiesced in by him, that he was one of its depositors and received a deposit book with the rules inserted therein, that the defendants were merely the officers of the *Caisse d'Economie de St. Roch*, and derived no pecuniary advantage from its business, or profits, the surplus, after paying expenses, being applied to the increase of the interest of the depositors; that the defendants were not the *Caisse d'Economie de St. Roch*, nor copartners, traders nor bankers, as alleged by

the plaintiff, and that they never contracted with the plaintiff nor borrowed or received money from him, as alleged. This defence is nothing more nor less than the general issue, but the plaintiff notwithstanding filed a Special Answer to it, in which he charges the defendants with the fraudulent use of the name of the Society of St. Vincent de Paul to obtain a credit for themselves amongst the poor, and to allure their money from them ; he asserts the want of legal character, rights or powers in that society, that it had formed no association to establish a savings' bank, that the approval of the defendants as directors of the *Caisse d'Economie de St. Roch*, did not relieve them from their personal liability as borrowers of money and traders therein, that the plaintiff and defendants were mere lenders and borrowers of money, subject to the agreement between them, that the rules were only a public notice of the terms on which the defendants borrowed money, that the rule against pecuniary advantage to the members and directors of the *Caisse d'Economie de St. Roch* was illusory and only intended to attract deposits, whilst the defendants used the money for their own advantage and to cheat and defraud the public and the depositors, and that the said rule was abandoned by the defendants, who publicly dealt in the funds of the *Caisse d'Economie de St. Roch*, and withholding them from the depositors, extorted money from them by the purchase from them at a great sacrifice with their own money of their deposit books ; that they assumed to act under the auspices of the society as a cover for their own trading and personal advantage, and as a lure and inducement to persons, including the plaintiff, to make deposits with them which were in fact taken by the defendants for their own advantage and that of each of them ; wherefore the plaintiff prayed not alone for the dismissal of the defendants' pleas, but further also prayed for the same conclusion as demanded by his declaration, to wit, the joint and several condemnation of the defendants ; thereby assuming two grounds for this conclusion, the first, upon the plain assumpsit grounds set out in the declaration, and the second upon the charges of

fraud and misfeasance set out in the special answer. The defendants demurred to this answer, but the Court ordered the parties to complete the issues, and thereafter to go to proof, *avant faire droit*; whereupon the defendants denied the allegations of the answer, maintained the charitable character of the *Caisse d'Economie de St. Roch*, and its connection with the society, denied that its funds had been improperly or fraudulently used by them, as alleged, reiterated the plaintiff's full cognizance of and participation in the formation and establishment of the *Caisse d'Economie de St. Roch*, and his acquiescence in its transactions, which were open and public, and only became deranged from a run made upon it, mainly caused by the plaintiff himself, at a period of general distress, and that they derived no profit or pecuniary advantage from its funds. The issues, as ordered, were completed by a general replication filed by the plaintiff, and the case was inscribed for evidence. As already observed, the action originally was in the common assumpsit form against the defendants, as partners and bankers, trading under the firm and name of the *Casse d'Economie de St. Roch*, upon the alleged contract entered into by their partnership with the plaintiff, the defendants in reply deny the partnership and contract, and the plaintiff in answer to this denegation charges them with a fraudulent conspiracy under the name and auspices of the society of St. Vincent de Paul to obtain a fraudulent credit for their personal profit, fraudulently to allure to themselves the deposits of the poor, and to cheat the public and the plaintiff in particular, in other words, the plaintiff charges them in his answer to their general denial of his alleged grounds of action, as set out in the counts of his declaration, with a criminal conspiracy to obtain from the public and from himself money under false pretences, and for these reasons he prayed for their joint and several condemnation. It will suffice to remark that this case pointedly illustrates the necessity of adhering to the common rules of pleading, and of not permitting one cause of action to be set out in the declaration, and another in a subsequent pleading with separate and inde-

pendent conclusions to each. In this case both law and practice justify the rejection by this Court of this irregular pleading, and the testing of the original issues by the evidence adduced. This course however will not be adopted, and it therefore becomes necessary to examine in detail a mass of evidence which has materially added to the complication first introduced by the defendants' severance in pleading. That evidence, analyzing it as adduced by both parties, resolves itself into the following particulars alone : 1o. That of a character common to the parties and to the case generally, namely, the existence of the charitable society of St Vincent de Paul at St. Roch in 1848, the suggestion made to the conferences and their approval of the establishment of the *Caisse d'Economie de St. Roch*, in connection with that society, their selection of delegates amongst whom was the plaintiff for the purpose, and who carried it into effect and established the *Caisse d'Economie de St. Roch*, in operation on the 24th. March, 1848, for charitable purposes in connection with the society, those delegates, fifty in number, including the plaintiff, being its permanent founders ; the appointment of a board of direction to superintend its affairs, with officers to perform the active duties of the *Caisse d'Economie de St. Roch* ; the adoption of rules, &c., the publicity given to its proceedings at its annual meetings in the reports of its auditors and in the publication of the annual statements, that no other *Caisse d'Economie de St. Roch*, or association under that name, existed in Quebec, except this *Caisse d'Economie de St. Roch* so established, that its business transactions of deposits and withdrawals, &c., were conducted at its known office at St. Roch, that its funds were deposited in a chartered bank in the city of Quebec, and drawn out by checks which required the signature and counter signature of two of the officers to render them valid ; that its affairs were managed and controled by the board of directors, five in number, one from each conference, and acting for four months at a time, that within a year or so from its establishment, the directors resolved to discount notes in order to meet the interest

allowance of $4\frac{1}{2}$ p. cent to depositors, and to pay expenses, the bank interest on their funds being less than that allowance, that this discounting, adopted in 1850, was then made known and openly continued, not only without objection by the depositors, but with their acquiescence, the surplus profits being for the increase of their interest, and that the operation was publicly reported and published in their annual statements of 1851 to 54, both inclusive :

20. That in connection with the plaintiff and his acts and doings, namely ; that he was a conference delegate, an establisher and founder of the *caisse*, that he only withdrew from his conference in 1856, about the time of the institution of this action, and has not shewn his withdrawal from his foundership : that he was one of the earliest depositors in the *caisse*, his account being no. 16, and his first deposit as shown in his exhibit No. 23, his deposit book, being on the 1st. April, 1848, at a period of a week after the *caisse* had gone into operation. His knowledge of the connection of the *caisse* with the society is proved by that book, its title page, being as follows.—“ Société de St. Vincent de Paul—Caisse d'Economie de St. Roch,—Extraits des “ règles et règlements, 1848,” that he again deposited on the 16th. of the same April, and withdrew his dispoits in June of the same year, renewing his deposits in April, 1851, with £100, with subsequent deposits until March, 1853, when his balance was £200 5 9, which he reduced in March, 1855, to £150 5 9, which sum was to his credit at the time of the suspension, and which, with interest added to 1856, is the sum demanded by this action. This deposit book was received by him from the original *caisse* which he had assisted to form and establish, that his first and all his subsequent deposits were made in the same *caisse*, and these and his withdrawals and the settlement of interest due, were all transactions between him and that same *caisse*, and were all entered in his deposit book at and by the same *caisse* and by its officers : that no other such *caisse* existed but this one of which he was a founder, and in which he had made his deposits, which he

knew, none other having been proved to have existed : his cognizance of these facts, as well as of the existence, object, character and operations of the *caisse*, with which he was dealing, and of the action of its officers, and the extent of their connection with these dealings, cannot be gainsaid nor contradicted, moreover, the only proof of any contract of loan or deposit whatever made by him to any association is afforded by that book alone, exhibit no. 23, which must be taken as it is. So. The proof for and against the defendants is as follows ; they were the officers of the *caisse* : Gauthier secretary from shortly after its formation in 1848, Brunet, treasurer appointed in 1851-2, Prevost was president in 1852, and continued in office subsequently, and Marois acted as assistant to both secretary and treasurer in 1854 ; at a previous period Marois appears to have been a director, namely from 3 or 4 years before its suspension ; neither Gauthier, Brunet nor Prevost are proved to have been directors, although some of the witnesses believe they were such *quia* they saw them receiving deposits and signing checks. Gauthier is proved to have been paid a small sum in two or three different years, in payment of extra services for keeping the books : Brunet never received any sum whatever, no testimony otherwise connects them with the *caisse*, and no evidence whatever proves them to have been partners, bankers and traders, under the name of that *caisse*, or in any way or with any person. It is in evidence that Prevost did receive applications from individuals for discount of notes to a large amount, to be done by the *caisse* : as president of the *caisse* the applications would naturally be made to him, especially as his own office was in the business part of the city, and he was more accessible there than a direct application would be at the office of the *caisse* in St. Roch : that the notes were regularly discounted at the *caisse*, and not by himself, at the legal rate of 6 per cent, charged and received by the *caisse* : that Prevost received from some of the discountees a commission or bonus out of the proceeds of the discount for his personal trouble, without any

detriment or reduction of the funds of the *caisse*, but in this commission neither Gauthier, Brunet nor Marois participated, nor is it in evidence that they were made aware of that fact. That Marois was a director, and, after the suspension, bought up at a discount depositors books representing a large amount, by means which his partner positively swears was his own, and which is vaguely and not satisfactorily asserted to have been by the funds of the *caisse* : that the purchases were made for the *caisse* itself, and have been held by Marois to cover his advances and interest thereon : again in these purchases of Marois there is no evidence connecting either Gauthier and Brunet, or even Prevost, with them, nor is it shown that they were depositors and might profit by them. The foregoing is a correct analysis of the evidence ; at the argument of the cause Allaire's counsel, unequivocally abandoned the ground of fraud charged upon the defendants, and explicitly rested his case solely upon the contract : this was judicious, because the allegations of fraud in the special answer have not been proved, and yet that point will, notwithstanding, form the chief if not the only ingredient of the opinions maintained by some of my colleagues in this court for confirming the judgment the Court below. Setting aside then the ground of fraud, it is difficult to conceive in what manner Marois' purchases after the suspension, or Prevost's receiving applications to submit notes to the *caisse* for discount in a regular way, and his subsequent acceptance of a bonus from the discountees, can establish the alleged copartnership amongst the defendants in their trading and banking : it is equally difficult to conjecture from the evidence, and particularly from the plaintiff's book, how the defendants could be in partnership in April, 1855, and June, 1856, and be charged with deposits made by him in 1851-2 and 1853, in his own *caisse*, established and founded by himself, of which he then was still a founder and continued so to be at the time of the institution of this action, and of which he knew that the defendants were only the officers, or acting as such, and some of them not even such when those deposits were

made. The evidence shews no fact from which the defendants can be conceived to have been copartners as alleged at any time, whilst the plaintiff's own evidence shews that his contract was made with the original *caisse*, and not with the defendants. Had they been the originators or promoters of an abortive association, that had not gone into effect, it might have been asked whether a partnership or quasi partnership liability to restore the deposit received by them might be admitted: but on the contrary the *caisse* went into operation and continued in active existence for 8 years, was established and founded by the plaintiff and his co-delegates, and not by the defendants, is not yet extinct, and may be wound up and an account rendered of its transactions, and it may be that the plaintiff may then receive his balance in full. To constitute a copartnership the parties must act as partners, or must hold themselves out as such, or must be in a situation to participate in the profits of a concern, or must have participated in the profits: this case presents neither of these conditions, nor does it show any voluntary agreement by the defendants, "de mettre en commun certaines choses, dans le but de partager ensemble les gains que peut engendrer l'exploitation de ces choses." Even admitting that the *caisse* by its course of discounting had become a banking and trading concern, that fact, a matter between third parties and itself, could confer no peculiar right upon the plaintiff against the defendants, its officers, except in case of their malversation or misfeasance, or for an account of their doings as president, secretary and treasurer, but could not make them personally liable for the balance due to its customers and depositors: it would be equally just and legal to make the cashier of a chartered trading bank so liable, and yet the effect of the final judgment to be rendered by the majority of this Court will sustain that proposition. As already observed, cases of this description, in which large numbers of poor people are shown to be sufferers naturally create a feeling in their favour, but sympathy with their sufferings is no sufficient ground to

depart from the claims of justice which belongs to all suitors, and which requires that judgment should be rendered according to the law and the real evidence of the case: after attentive examination of the pleadings and careful analysis of the evidence, the judgment appealed from does not appear to be susceptible of confirmation and should be reversed.

AYLWIN, Justice :—The parties have had every opportunity of being fully heard upon these appeals. It is true, as has been contended, that one of the parties to this appeal is the beadle of a church, that another is a city treasurer and a third a notary public, this in no degree affects the liability of the parties to the action. In adjudicating upon the matter, let the question of fraud, *délit* or *quasi délit*, be set aside, and the case regarded strictly as a commercial contract. The society of *St. Vincent de Paul* has nothing to do in the case, no more than the society of *St. Joseph*, or that of the *Congréganistes*, and although an association such as that of *St. Vincent de Paul*, might be used for the formation of a Savings' Bank, and use its influence to induce persons to lay aside their earnings, the legislature has passed laws, as respects the organization of these Savings' Banks, of a nature to prevent individuals, assuming to be directors or *gérants*, from possessing themselves, by acts of spoliation and robbery, of the small earnings of the depositors under the mask of benevolence. Under the auspices of the society of *St. Vincent de Paul* the proceedings to organize a Savings' Bank were well and properly commenced. The monies which were first deposited, were placed in the Quebec Bank, and then employed to advantage. Subsequently, however, the whole was used, managed and turned to the profit of four or five individuals who possessed themselves of the monies, and acquired all the power of and governed the institution. In imitation of other banks they arrogated to themselves the right of making a greater amount of profit, and for a time succeeded, but under such circumstances as to

incur certain obligations which the law has imposed upon them. Was the association, styled the *Caisse d'Economie de St. Roch*, a commercial copartnership or was it not? The term *Caisse* certainly does not imply merely a strong box encircled with iron bars and furnished with a key. The persons who composed it, the directors, *gérants*, are prohibited by law from carrying on trade without recording their names; a particular statute imposed upon the members of this association the obligation of stating who were the members of it. Artistically enough, under the name of *Caisse*, they assumed to themselves the power of doing what they pleased with the funds of the depositors, and what has been the consequence? The seat of their business came to be an obscure locality in the office of a notary. Applications were not made at any known office, but secretly at the president's office, and loans were made, not upon the security of debentures, or other public securities; in one word, discounts were allowed upon the credit of individuals. What right had these persons, the appellants, to do this? it was in fraud of the depositors, but the profits were considerable, and instead of lending money at the rate of six per cent, ten per cent was taken as in the case of Bilodeau and Co., and Thornton Smith. With all this the society of *St. Vincent de Paul* had nothing to do, and, most assuredly, it did not contribute the funds for the carrying on of this business. Whatever the ordinary occupation of the appellants may have been, in the transactions adverted to, they became traders; and as respects Brunet, the beadle of the church, at *St. Rochs*, his ministrations had much better have been confined to the ringing of the church bells and the distribution of the *pain béni*, and not extended to the business of banking. As originally intended the appellants were not, individually, to receive any benefit or advantage from the profits of the *Caisse d'Economie*. In the pass-books there is an express condition to that effect. The question is, have those persons, notwithstanding, individually profited from the business. Each discount made was a transaction intended for

profit, and if they have individually profited, they are, individually, answerable. The business carried on through Prevost comes under the popular designation of shaving, and he extorted the premiums of a shaver. As respects the other appellants they were placed as a guard to protect the interest of the depositors by a regulation which required the signatures of two of them before the monies could be appropriated. They gave their signatures to Prevost, by so doing they approved of his conduct, and participated in his dishonest profits. The respondent Allaire requested the production of the books so as to obtain a faithful *exposé* of the business. This the appellants have refused, and they still keep them concealed, and why? it can be for no other reason than to hide their fraud which would have been made apparent by their production, and because they would have exhibited a dishonest appropriation of the funds of another. As respects their liability it is not affected by any question as to the exact portion of the booty which each may have secured for himself. It has been contended that the respondent Allaire participated in the business and approved of the manner in which it was conducted, because at public meetings the appellants received thanks for their management. Supposing that he did so, it was upon the false representations of the appellants, made from year to year, and what do we find at the end of them? A general bankruptcy. Then again, have these individuals called a meeting of the poor and unfortunate sufferers; have they confessed that they have done what they ought not to have done? No,—they have not,—they continue the same course, and here Marois appears upon the scene, and through him the unfortunate individuals are, from poverty, forced to sell their claims to him. He with the assistance of a Mr. Lepage who has not been made a party to this suit, has been engaged in the infamous traffic of speculating upon the misery of the poor and unfortunate depositors.—Then, as to the form of the action, which has been objected to. The action as it has been instituted is perfectly applicable to the case. Again, it has

been argued that the appellants were not in office throughout the period within which the respondent made his deposits. The answer is, that they renewed the entries in the books every year while they carried on the business, and thereby agreed to pay the balance after ten days' notice. The obligation of the defendants became direct and personal the moment that they commenced trafficking as bankers. The contract between the appellants and the respondent involved an express direct obligation to repay so much money with interest at the rate of $4\frac{1}{2}$ per cent for the use of it. The special answer of the respondent has also been objected to ; this again sets up the fraud of the appellants, and is perfectly correct as it applied to the original contract. The case is one of the greatest interest to society, and it is fitting that the public should know that there is a tribunal which can control individuals in their management of such a concern as this Bank is proved to have been.

MONDELET, Juge.—Cette importante affaire, très-compliquée, à première vue, en est une assez simple. Un individu place des fonds entre les mains de certaines personnes qui se donnent comme gérants ou directeurs d'une institution appelée " Caisse d'Economie de St. Roch," à la condition qu'on lui payera certains intérêts, et que sur avis de 10 jours, il aurait droit de retirer ses argents.

Je dois, de suite, remarquer qu'il est oiseux de se cramponner au chef de la déclaration qu'on prétend reposer exclusivement sur un contrat ; il y a dans cette déclaration nombre de chefs, on ne s'en est pas plaint, dans tous les cas la Cour de première instance n'a pas fait justice de cet amalgame, de cette mosaïque de diverses formes d'action, nous l'acceptons, avec les parties qui s'en sont faits la loi et la règle de la cause, et de son instruction. Je ne vois pas de nécessité de s'occuper de la question qu'ont soulevée les défendeurs, savoir : qu'ils étaient alors les gérants de la Caisse d'Economie de St. Roch, et qu'on ne

peut s'en prendre à eux que par une action en reddition de compte. Je dirai néanmoins, en passant, que cette prétendue organisation ou constitution de l'association en question, est loin d'être prouvée.

Mais laissant cela de côté, il y a un fait qui ressort du témoignage, c'est que ces prétendus gérants ont pris sur eux de faire le commerce de banque, et ont par là, frauduleusement, dans le sens égal, du moins, détourné, sur leur propre responsabilité, des deniers déposés entre leurs mains, dans un but louable, dans le principe, comme devant être avantageux à ceux qui déposaient ainsi ce qu'il réussissaient à mettre de côtés dans leur propre intérêt, et surtout dans l'intérêt de leurs familles. Ayant ainsi fait le commerce de la banque, et détourné ces argents, les appelants qui ont agi de concert, dans cette fraude, sont solidairement responsables envers l'intimé.

Mettant de côté la question de fraude, et n'envisageant les appelants que comme associés dans l'affaire dont ils ont assumé la responsabilité, c'est-à-dire, escompter aux uns et aux autres des billets, au moyen de deniers qui avaient été déposés entre leurs mains, par l'intimé et autres, ils sont solidairement tenus envers ces individus, et nommément envers l'intimé, de leur remettre ces argents.

Quant à l'avis des dix jours, à l'occasion duquel les appelants ont fait une si triste chicane, il n'a pu être donné régulièrement, pour la meilleure de toutes les raisons, c'est que la banque, où la maison d'affaires des appelants, étaient fermée, (cela est prouvé) et qu'il va sans dire, que ceux dont on avait divertis, de la sorte, les deniers, devaient sans perte de temps, prendre les moyens de se protéger.

Au reste, comme je suis d'avis que cette institution n'était pas légalement et régulièrement constituée, il m'importe peu que l'avis de dix jours ait été ou non donné—l'intimé qui avait déposé ou prêté son argent, la redemande, on l'a dépensé ou gaspillé, on ne le rend pas ; *Indè*, l'action actuelle qui, suivant moi, est bien fondée.

J'adopte, sans difficulté, la conclusion, c'est-à-dire, la condamnation que comporte le jugement de la Cour de première instance ; mais quant aux motifs, ils me paraissent inexacts, entre autres, que les défendeurs étaient membres d'une société. " Under the firm and style of *Caisse d'Economie de St. Roch*," je ne reconnais pas cette société comme légalement constituée. Ainsi, je suis d'avis qu'il faudra, tout en condamnant les défendeurs-appelants, faire reposer le jugement sur ce que :

10. Vu la fraude, attendu que le demandeur a déposé ses argents entre les mains de gens qui se disaient les gérants de cette prétendue association, et qui ont détourné ces argents etc.

20. Que s'étant immiscé, sur leur propre responsabilité, dans un commerce de banque, ils l'ont fait au moyen des argents déposés par le demandeur et autres, ont perdu ou gaspillé ces argents, et sont tenus, solidairement, de les rembourser au demandeur intimé.

Il me paraît plus sûr et plus conforme au témoignage écrit et oral de la cause, de réduire à sa plus simple expression, la phraséologie du jugement à rendre, tout en confirmant celui de la Cour de première instance.

La Cour, c'est-à-dire, la majorité des Juges, adopte ce motif, qui sera celui de son jugement, par lequel le jugement de la Cour de première instance est confirmé.

SIR L. H. LAFONTAINE, Bart., Chief-Justice.—Said that the *Caisse d'Economie de St. Roch* was commenced under honorable auspices. The parties who were active in the conduct of the business should have seen that there were annual elections, and that the directors, according to the original plan, received no salary. An adherence to the original organization lasted but for a time, when the appellants settled themselves down permanently, (*en permanence*) as the parties individually who carried on the business. From the commencement there appears to have been an

arrière pensée in the first president who profited from discounts made at the rate of ten per cent. It appears also, that the appellants have in hand about £14,000 which they retain. The whole conduct of the appellants manifests a plain case of fraud, (*escroquerie*).

“ The Court having heard the parties by their advocates on the merits, examined the record of the Court below, as well as the reasons of appeal, and answers, and upon the whole maturely deliberated,—considering that it is in evidence that the appellants have made themselves parties to a banking business, (*se sont immiscées dans un commerce de banque*) which they have carried on with the funds of the association, known by the name of *Caisse d'Economie de St. Roch*, and that thereby they have rendered themselves liable, jointly and severally, to the respondent, for the repayment, with interest at the rate of 4½ per cent, of money by him deposited in the said bank, (*Caisse*) as a special deposit, and, inasmuch also as the judgment of the 5th. of April, 1860, appealed from is correct in the amount awarded, this Court confirms the said judgment, with costs to the appellants. ”

Mr. Justice Duval and Mr. Justice Badgley, the latter appointed to supply the place of Mr. Justice Meredith, dissented from the judgment,

TASCHEREAU, for Prevost.

TESSIER, for Brunet and Gauthier.

KERR, for Marois.

STUART, G. OKLIL, Q. C., for the respondent Allaire.

Memorandum of authorities cited by the appellants.

Duvergier, vol. 5 p. 20 :—Zoullier, Nos. 316 and 317, p. 372 :—12 Dalloz, vbo. Société, p. 82 :—17 Duranton, No. 455, p. 508 :—Revue de Legislation, Nesbitt vs. Turgeon, vol. 2 pp. 43 to 46 :—Perril, Tr. des Sociétés, art. 32, pp. 112, 125 :—Dalloz, Dict. de Jurisprudence, vol. 5, Supp. 182, ib. p. 181, Action Judiciaire :—Poncet, des Actions, 209, 210 :—Dalloz, Juris. Univ., 1830, p. 432, No. 17, Index analytique :—Quebec Bank vs. Gibb, No. 568 :—Tropkong Société, Nos. 2, 4, 6, 8 and 11 :—Poth. Société :—7 Duranton, Nos. 3 and 6 :—Delangle, Société Comm., 1, 2, 7 and 10 :—Collyer, No. 16 and 18 :—3 B and C 814 :—1 Parsons, 146.

Additional authorities cited by the respondent.

Pothier, Société, Nos. 56, 57, 58, 59, 60 and 61 :—Addison on Contracts, 417 :—Perril, 125 to 141, Arts, 29 to 37 :—Grant on Banking, 614, 617.

BEFORE THE LORDS OF THE JUDICIAL COM-
MITTEE OF THE PRIVY COUNCIL.

Present :—LORD JUSTICE KNIGHT BRUCE, LORD JUSTICE
TURNER and SIR JOHN T. COLERIDGE.

THE MONTREAL ASSURANCE COMPANY,..... *Appellants.*

and

McGILLIVRAY..... *Respondent.*

Held :—That, in the case submitted, inasmuch as the appellants could only become liable to a party insured by a regular policy of insurance in writing, and the judgment rendered against them, (founded upon the verdict of a jury)—resting upon oral evidence of the insurance, having been reversed, the parties were bound again to submit the case to a jury (1).

Jugé :—Que, dans l'espèce, les appel-
lants ne pouvaient être liés envers un as-
suré qu'en vertu d'une *Police* écrite et
régulière, et le jugement prononcé contre
eux, (conformément au *verdict* d'un jury)
fondé sur simple preuve verbale de l'as-
surance, ayant été infirmé, les parties
devaient subir une nouvelle épreuve de-
vant un jury.

Judgment delivered the 8th. February, 1861.

This was a petition for the purpose of procuring an al-
teration in the order which had proceeded from Her Ma-
jesty in Council in the appeal of the Montreal Assurance
Company vs. Dame Elizabeth McGillivray.

In the proceedings below there had been first an action
brought in the Superior Court in Canada, on a contract for
insurance against loss by fire, in which judgment had
passed for the respondent Elizabeth McGillivray, the
plaintiff below, in a large sum. An appeal to the Court
of Queen's Bench in Canada had been instituted, and that
Court, by a majority of the Judges, had confirmed the
Judgment in all respects.

A great number of points were mooted in the argument
before their Lordships, but ultimately their Lordships gave
their judgment expressly upon one point only, which they
considered to involve, and finally to involve, a decision
upon the whole merits of the case, and by that judgment,
as they recommended that the judgment of the Court of

(1) See reports of this cause : 8 L. C. Reports, p. 401 :—9 L. C. Reports, p. 488 and 10 L. C. Rep. p. 365.

Queen's Bench should be reversed, an order to that effect was consequently made.

: Upon this order being transmitted to the Court of Queen's Bench in Canada, the Judges of that Court have filed it, on the prayer of the appellants, but they have declined to do anything more ; so that the appellants, the Montreal Assurance Company, who have been successful in the appeal, are unable to reap any benefit from the decision which has been pronounced in their favour.

On the hearing of the present petition it appeared that both sides were desirous that some alteration should be made in the form of the report of this committee to Her Majesty on which the order has been made.

It has already been stated that the Montreal Assurance Company complain that they can reap no benefit from the judgment which has been pronounced upon the merits in their favour, and on the other side it was contended by the counsel for the plaintiff below that the judgment having proceeded in effect upon that which in substance may be said to be, and at all events in form is, analogous to a bill of exceptions in the English Courts, no other judgment could properly be pronounced than that of directing a *venire de novo* to issue.

Without expressing any opinion (and their Lordships desire to express none) as to how far the position of the counsel for the plaintiff below is correct in its application to that which is analogous to a bill of exceptions in this country, their Lordships are certainly of opinion, under the circumstances of this case, that in point of form the report and order should be amended, and therefore they have determined that they will humbly recommend to Her Majesty that so much of the former order as directed a reversal of the judgment of the Court of Queen's Bench be altered, and that that Court be ordered to remit the cause to the Superior Court, with directions to issue a writ of *venire de novo*.

The present order in all other respects to stand, and there will be no costs of this petition.

And their Lordships desire it distinctly to be understood that they express no opinion upon any other points raised by the record and argued before them, upon which no judgment was given before, and also that they make this correction in a matter of form, as they deem it, and not at all as affecting their decision upon the merits of the case.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—Sir L. H. LaFontaine, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BONACINA..... *Appellant.*

and

McKINTOSH..... *Respondent.*

An opposant, resident in Scotland, filed an opposition in 1859, as legatee under a will by which the testator bequeathed to her "the sum of £50 sterling, annually, during her natural life," claiming to be paid out of the proceeds of the sale of a farm left by the testator, but sold by sheriff's sale after his death for the debt of his son, one of the universal legatees.

The report or *projet de distribution*, by which the opposant was allowed to rank for a part of the sum, was contested by the defendant, widow of one of the universal legatees, andatrix to her minor children, on the ground that the opposant had never lived in this country, and that she was dead before the death of the testator, who died in 1842.

The answer to this was general and no evidence was adduced on either side :

Held, In the Superior Court, Montreal:—That the *onus probandi* of the death of the opposant lay on the contesting party who had alleged it.

In appeal:—That it was the duty of the opposant to establish her existence.

Une opposante, résidant en Ecosse, produisit une opposition en 1859, comme légataire en vertu d'un testament par lequel le testateur lui léguait "la somme de £50 sterling annuellement, pendant sa vie durant," réclamant son legs sur les deniers provenant de la vente d'une terre délaissée par le testateur, vendue par décret après son décès par les créanciers de son fils, un des légataires universels.

Le rapport ou *projet de distribution* par lequel l'opposante était colloquée pour partie de la somme réclamée, fut contestée par la défenderesse, veuve de l'un des légataires universels, et tutrice de ses enfants mineurs, par la raison que l'opposante n'avait jamais résidé dans ce pays, et qu'elle était morte dès avant le décès du testateur, qui était arrivé en 1842.

La réponse à cette contestation était générale et il ne fut produit aucune preuve de part ou d'autre :

Jugé, Dans la Cour Supérieure, Montréal:—Que l'*onus probandi*, du décès de l'opposante incombait sur la partie qui l'avait alléguée.

En appel:—Qu'il incombait à l'opposante d'établir son existence.

Judgment rendered the 1st. day of June, 1861.

This was an appeal from a judgment of the Superior Court, Montreal, rendered on the 31st. December, 1859, on

a contestation, by the defendant, of the opposition of Jane McIntosh an opposant *afin de conserver*. (1)

Only one point was argued in appeal, which was as to whether the *onus* of proof of the existence or death of Jane McKintosh was, under the pleadings and facts of the case, thrown upon the appellant or upon the respondent.

The appellant filed a contestation in the Court below of a report of collocation by which Jane McIntosh was colloccated for a sum of money in deduction of £2000 claimed by her under the will of William McIntosh.

The contestation of the appellant on the point in question, was in the following terms: "Que la dite Jane McIntosh, au nom de laquelle la dite opposition afin de conserver a été faite, n'a jamais demeuré dans le pays, et qu'elle est décédée avant le décès de feu William McIntosh, son frère, qui lui a légué la pension ou rente viagère de £50 sterling par année, réclamée en son nom, et pour laquelle rente ou pension viagère elle est colloquée par la dite huitième collocation."

The death of the testator took place on the 16th. February, 1842, and the opposition was filed on 6th. September, 1859.

In appeal the authorities quoted below were cited on behalf of the appellant. (2)

Robertson, A. for the respondent, contended that the authorities were not applicable to a case like the present, but applied either to cases where parties came into Court claiming rights as being heirs or representatives of ab-

(1) *Vide* 10 L. C. Reports, p. 79.

(2) 2 Pothier, Tr. des rentes, p. 97, no. 257 :—1 Journal du Palais, p. 182, arrêt de 13 Février, 1572 ; arrêt de 1629 :—1 Journal des Audiences, p. 177, arrêt de 1734 :—7 Journal des Audiences, p. 282 :—4 Locré, p. 279 :—6 Pothier, des Successions, p. 8 :—Lebrun, des Successions, p. 2 :—Merlin, Rép., vbo. Légitime, sect. 2, § 1, chap. 59 :—Merlin, Rép., vbo. Rente viagère, § XV :—Merlin, vbo. Vie, § 11, certifiât de vie 1 et 3 col. :—Code civil, art. 135, 136, 1963 :—1 Duranton, p. 456, no. 533 ; p. 459, nos. 535, 537 :—4 Boquet, Explication du Code Civil, p. 526 :—Démolombe, p. 223, nos. 200 to 204 :—Sirey, 1825, 1, 159.

sentees who were dead, or were claimed to be dead, or to cases where a *rente viagère* properly so called was in question.

That the claim of Jane McIntosh, was not a *rente viagère*, but was an ordinary claim founded upon the will as the opposant's title, and that to insist on the opposant proving her existence would be a palpable violation of the maxim *ei incumbit probatio &c.*

The following are the remarks of the Chief Justice on the point referred to :

“ Il me reste à dire un mot de la question à laquelle le conseil de l'appelante semble avoir attaché le plus d'importance, à qui *incumbit onus probandi* de la vie ou de la mort de la dite Jane McIntosh ? Le créancier, qui se présente pour réclamer, ou au nom du quel on réclame des arrérages de rente, est-il tenu, lorsque son existence est déniée, de faire apparaître de cette existence ? ”

“ La lettre qui est produite comme ayant été adressée d'Ecosse à madame Reed de cette ville, datée du 13 octobre, 1859, ne prouve pas que la dite Jane McIntosh soit encore vivante. Ayant été néanmoins produite de la part de l'intimée, cela indiquerait que les avocats qui agissent en son nom, ont cru qu'ils étaient obligés de faire la preuve de son existence.”

DUVAL, Justice.—The only point decided in this case is that the burden of proving the existence of Jane McIntosh lay on her.

MONDELET, Justice.—Survivorship should have been proved by her.

JUDGMENT.—Seeing that the appellant hath expressly put in issue the existence of the respondent at the time of the filing of her opposition, and the fact of her having survived the testator, and that the burden of proof lay upon her.

Seeing that the respondent hath failed to make such proof, and that, therefore, in the judgment awarded to her in the Court below there is error, &c., &c. (1)

DORION, DORION and SENECA, for appellant.

HUGH TAYLOR, for respondent.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—SIR L. H. LAFONTAINE, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

GRANT..... *Appellant.*

and

THE ETNA INSURANCE COMPANY..... *Respondent.*

In a policy of insurance against fire, of the 30th. July, 1868, there was a clause whereby it was stated that the Company defendant "do insure B. G. (the plaintiff) against loss or damage by fire to the amount of \$4000, on the steamboat "Malakoff now lying in Tait's dock, and intended to navigate the St. Lawrence and Lakes, from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place to be approved of by the Company."

The vessel was burnt on the 25 June, 1869, during the continuance of the policy, in Tait's dock, she never having left the dock :

Held :—That whether the clause above cited was considered as a warranty or not, no action could be maintained against the Company, the vessel never having left the dock.

Dans une police d'assurance du 30 juillet 1868, il y avait une clause par laquelle il était stipulé que la compagnie défenderesse—"Assure B. G. (le demandeur) contre toute perte ou dommage par le feu au montant de \$4000, sur le vapeur *Malakoff*, maintenant dans le dock de Tait, et destiné à naviguer le St. Laurent et les Lacs, de Hamilton à Québec, principalement pour le transport de fret, et pour être mis en hivernement dans un endroit qui sera approuvé par la Compagnie."

Le vaisseau fut incendié le 25 juin, 1869, dans le dock de Tait, pendant que la police était en force, le vaisseau n'étant jamais sorti du dock :

Jugé :—Que la clause ci-dessus fut considérée comme une garantie ou non, aucune action ne pouvait être maintenue contre la Compagnie, le vaisseau n'étant jamais sorti du dock.

Judgment rendered 3rd. June, 1861.

The judgment appealed from in this case will be found reported *supra* p. 128.

(1) In this case a point arose as to the amount of security to be given on the appeal instituted by Jane McIntosh to Her Majesty in Her Privy Council. The clerk of the Court had made out a bond with a justification for £3000. The parties were heard before Mr. Justice Aylwin, in Chambers, on the 12th. April, 1861, who held that as the sum for which Jane McIntosh was collocated in the Superior Court (£1388 2 3) was still to be held in the sheriff's hands, that sum should not be taken into account, except as to what might accrue as interest thereon during the time the appeal might be pending, which interest he would fix at £150, and for ordinary costs of appeal £500, in all 650 cy.; for which sum a bond with two sureties was given.

Sir L. H. LaFontaine, Bart. Juge-en-Chef, *dissentiente*.
Action fondée sur un contrat d'assurance.

Le demandeur, propriétaire du bateau à vapeur le *Malakoff*, qui fut détruit par le feu dans le mois de juin 1859, réclame le montant de l'assurance (£1000).

Le procès a été instruit devant un corps de jurés dont le verdict a accordé au demandeur la somme de £900.

Ce verdict a été attaqué par trois motions de la part de la défenderesse ; la première " pour suspendre le jugement (in arrest of judgment), la deuxième, " pour demander un nouveau procès," et la troisième pour jugement en faveur de la défenderesse *non obstante veredicto*. Les trois motions ont été faites le même jour, le 20 février, 1860, et paraissent avoir été faites dans l'ordre ci-dessus indiqué.

Jugement a été prononcé par la Cour de première instance sur ces trois motions le 31 mars 1860. Il commence par débouter la défenderesse de sa motion " pour suspendre le jugement " (in arrest of judgment), puis il lui accorde le profit de sa troisième motion, celle par laquelle elle demandait jugement en sa faveur *non obstante veredicto*, et déboute en conséquence le demandeur de son action ; enfin il rejette la deuxième motion, celle-ci n'étant plus nécessaire en conséquence de l'octroi de la motion qui demandait le débouté de l'action.

C'est sur l'appel du demandeur que nous sommes saisis de cette cause. Ainsi, nous n'avons à nous occuper, ce me semble, que du bien ou mal jugé sur la motion pour jugement *non obstante veredicto*.

D'après la police d'assurance, la compagnie défenderesse " do insure Benjamin Grant, Esq., against loss or damage " by fire to the amount of \$4000..... on the steamboat " *Malakoff*, now lying in Tait's dock, Montreal, and intended to navigate the St. Lawrence and lakes, from " Hamilton to Quebec, principally as a freight boat, and to " be laid up for the winter in a place approved by the

“ company who will not be liable for explosions either by steam or gunpowder.”

Il a été admis de la part du demandeur que le bateau à vapeur, qui était dans le bassin de Tait lorsque l'assurance fut effectuée, n'en est pas sorti, et que c'est au même endroit qu'il fut détruit par le feu l'année suivante.

La clause de la police d'assurance, ci-dessus citée, “ intended to navigate &c., &c.,” a fait la base de la troisième exception de la défenderesse, et a servi de motif au jugement sur la motion *non obstante veredicto*. L'on a vu dans cette clause une condition essentielle stipulée dans l'intérêt de la compagnie, une *garantie* que le demandeur lui donnait que, de fait, le bateau à vapeur serait employé à la navigation. La défenderesse a été jusqu'à dire dans son exception que s'il eût été ainsi employé le jour de l'incendie, il n'aurait pas été détruit par le feu ; et elle a même pris sur elle d'affirmer, dans son articulation de faits, qu'elle en fournirait la preuve. Comment, par quels moyens, c'est ce qu'il ne m'est pas donné, malheureusement, de comprendre.

Le Juge qui a présidé au procès devant le corps de jurés n'est pas le même que celui qui a rendu le jugement sur les trois motions. Il paraîtrait que M. le Juge Smith a donné à la clause dont il s'agit une interprétation différente de celle qui a été consacrée par le jugement. Il ne l'a regardée que comme contenant une faculté que le demandeur stipulait pour lui-même, faculté dont il pouvait user ou ne pas user, selon qu'il le trouverait de son intérêt. Je partage l'opinion de M. le Juge Smith.

L'examen de la prétention de la défenderesse doit porter d'abord sur une question de faits. C'est celle du plus ou moins de risque qu'il pouvait y avoir pour l'assureur. La compagnie l'a si bien compris qu'elle a prétendu que le bateau restant dans le bassin de Tait, le risque était, pour elle, plus grand que s'il eût été employé à naviguer. C'était là un fait sur lequel le jury devait être appelé à

prononcer, dans l'hypothèse où la clause aurait pu devenir, dans l'évènement, susceptible d'avoir le sens que le jugement lui donne. Nous avons sur ce point l'opinion de la défenderesse elle-même qui, dans sa suggestion écrite, faite au juge, pour arrêter les questions qui devaient être soumises au jury, posa la question suivante : " 6o. Was the said steamer exposed to greater risk and damage from fire in the said dock than if she had been navigating in conformity with the laws of this province respecting steamboats and steamboat inspection ? " La suggestion a été adoptée et forme la huitième question soumise au jury, et à laquelle le jury a répondu négativement. L'effet de cette réponse est d'ôter à la défenderesse tout prétexte qu'elle pouvait avoir à alléguer à l'appui de sa prétention. Puisque, de fait, le risque n'était pas augmenté pour l'assureur, il était donc indifférent à celui-ci que le bateau fût employé ou ne fût pas employé à la navigation, le bateau ne devant pas naviguer pour son profit, au contraire, la navigation ne pouvait avoir lieu que dans l'intérêt du demandeur, si elle dût être profitable. Le demandeur en était seul le juge. Il était donc bien naturel qu'il se réservât la liberté de faire naviguer son bateau, et à l'exercice ou non-exercice de cette liberté de la part du demandeur, la compagnie n'était en aucune manière intéressée. Le choix du lieu d'hivernement devait être approuvé par la compagnie, il est vrai, mais cela était subordonné à l'exercice de la faculté que le demandeur avait stipulée.

L'assurance a eu lieu le 30 juillet, 1858. C'était durant la saison de la navigation, aucun délai n'était donné au demandeur. Si donc la prétention de la compagnie était fondée, il s'ensuivrait que si l'incendie avait eu lieu le lendemain même de l'assurance, le demandeur n'aurait pas eu le droit d'invoquer son assurance.

MONDELET, Justice.—Stated that after due consideration of the clause of the policy which had given rise to the question in the cause, where the steamer is described as lying " in Tait's dock, Montreal, and intended to navigate

“ the St. Lawrence and Lakes, from Hamilton to Quebec, “ principally as a freight boat, and to be laid up for the “ winter, in a place to be appointed by the company ” he had come to the conclusion, that both the spirit and the letter of the policy warrant the opinion that the words “ now lying,” meant that the “ Malakoff ” was in dock only temporarily, and the words “ intended to navigate ” plainly indicated, that it was the intention of the assured, and the stipulation (in their own favor) of the insurers that the steamer was insured with the risk resulting from the navigation of the river St. Lawrence or the lakes, and that no other risks should be incurred during the season of navigation. As to the winter quarters, they were to be subject to the approval of the insurers, it being covenanted that the boat should “ be laid up for the winter in a place “ to be approved of by the Company.”

It appeared to him that independently of what the witness Wood said, that higher rates of insurance would have been asked if it had been contemplated to leave the vessel in dock, it did not seem reasonable to suppose, much less to affirm, that the insurers would have consented to run the risk of insuring a vessel which the owner would be at liberty to leave a whole summer in a dock, surrounded by houses, workshops, with all sorts of people going to and fro. The risk in such a case was different. On the water, there was constant vigilance and care over the boat, with plenty of means of extinguishing fire and arresting its progress ; in the dock none, especially at night.

If it was not clearly intended that the boat should be used to navigate, how comes it that she was to be taken for the winter to a place approved of by the Company—“ to be *laid up* for the winter in a place to be approved of by the Company.” This surely meant that she was to be removed from the dock ; and is it reasonable to say that *at the close of the navigation*, a vessel which was intended to navigate would be removed from a dry dock and *laid up* for the winter, clearly not.

He was therefore of opinion that the Court below was right in rendering judgment in favor of the defendants, *non obstante veredicto*, and dismissing the plaintiff's action.

AYLWIN, Justice.—Held that, although in England or in the United States it was unheard of that three motions such as were submitted to the Court below could be made by a defendant, yet according to our provincial statute there was nothing prohibiting such a course. The case was brought to this Court on an appeal; the evidence was sent up, also the judge's charge and the findings of the jury, so that the whole case was before the Court, and in several instances this Court had rendered judgment one way, whilst the verdict of the jury and the judgment of the Superior Court had been the other way. So that upon a defendant's motion for judgment, *non obstante veredicto*, a motion not allowed according to English practice, judgment might be given dismissing the action. The learned judge who had decided in the Court below upon the motions of the defendants had exhausted the authorities bearing on the point. He coincided with that judgment, and this without inquiring whether the words referred to in the policy "now lying in Tait's dock, and intended to navigate the Saint-Lawrence" were to be taken as importing a warranty or not. The vessel *was to be used*, and it made no kind of difference whether the risk was or was not increased by her remaining in dock. It was admitted the vessel did not leave the dock, and the question which arose was one of construction of the Policy, it was a question for the Court to decide and should not have been submitted to a jury. Looking at the substance of the case he did not see any reason for sending it back to another jury. The questions would have to be remodelled, and it was not too much to say that nonsensical answers to absurd questions would continue to be given until the bar assisted the Court below in submitting the substantial questions of fact, and these alone, to the jury, leaving the Court to deal with the law. Here however, there was the policy, and there

was the admission that the boat had never left the dock. That was enough to shew that the defendants were not responsible to the plaintiff, and that the action should not have been brought.

DUVAL, Justice.—The question as to whether there was an increase of risk should not have been put to the jury. It was enough, when the fact was admitted, that the vessel did not leave the dock to shew that under the policy no action ought to be maintained against the Company.

Judgment maintained.

MACKAY and AUSTIN, for appellant.

ROSE and RITCHIE, for respondents.

STUART, HENRY, counsel for respondents.

SUPERIOR COURT.—QUEBEC.

Before:—STUART, Justice.

No. 2154. { EVANS..... Plaintiff.
vs.
SMITH Defendant.

In 1852, the plaintiff and her sister sold to the defendant certain property for a life rent, the deed contained a *pacte commissaire* or clause to the effect that if the defendant failed to make payment of the life rent, the vendors would be entitled to procure the setting aside of the sale, and to resume the possession of the property. In 1857, the defendant having failed to make payment of the rent, and being then eight quarters in arrear, the parties to the deed of 1852 made another by which the defendant retroceded to the plaintiff and her sister a certain portion of the property sold by the deed of 1852—the deed of 1857 provided that the vendors should retain their mortgage and privilege of *baillieur de fonds* under the said deed of 1852, and that the defendant should assign to them the rents, issues &c., of the property left him. In 1859, the defendant having again failed to make payment of the rent due as fixed by the deed of 1857, and the plaintiff having brought her action to rescind the deed of 1852, under the *pacte commissaire* contained therein:

Held:—That the covenant or *pacte commissaire* contained in the deed of 1852 had ceased to exist by reason of the transaction contained in the deed of 1857.

En 1852, la demanderesse et sa sœur vendirent au demandeur certaine propriété à rente viagère, l'acte contenait un *pacte commissaire* par lequel il était stipulé que si le défendeur faisait défaut de payer la rente viagère, les vendeurs auraient droit de faire rescinder la vente, et de rentrer en possession de la propriété. En 1857, le défendeur ayant fait défaut de payer la rente, et étant arriéré de huit quartiers, les parties à l'acte de 1852 en firent un autre par lequel le défendeur retrocéda à la demanderesse et à sa sœur une certaine portion de la propriété vendue par l'acte de 1852—par l'acte de 1857, il était pourvu que les vendeurs conserveraient leur hypothèque et privilège de *baillieur de fonds* en vertu du dit acte de 1852, et que le défendeur leur transporterait les loyers et revenus des propriétés qui lui restaient. En 1859, le défendeur ayant de nouveau fait défaut de payer la rente viagère aux termes de l'acte de 1852, et la demanderesse ayant porté son action en rescision de l'acte de 1852, en vertu du *pacte commissaire* y contenu:

Jugé:—Que le *pacte commissaire* ou clause contenue dans l'acte de 1852 avait cessé d'exister en raison de la transaction contenue dans l'acte de 1857.

Judgment rendered the 3rd. December, 1860.

STUART, Justice.—On the 22nd. January, 1852, the plaintiff, and her sister Jane Evans, made a sale to the defendant of two houses in the Upper Town of Quebec, for an annuity or life rent of £425 a year, to diminish by one half upon the death of either of the vendors, and to cease upon the death of both; this deed contains the following covenant: “ Provided always, “ and it is hereby expressly covenanted and agreed by and “ between the said parties, that should the said T. R. Smith, “ his heirs or assigns, fail or make default in the punctual

“ payment of the aforesaid life rent, at the quarterly terms
 “ aforesaid, and at any time be two quarters in arrear with
 “ the payment thereof, or should he or they fail or make
 “ default in his aforesaid obligation of maintaining and
 “ upholding the aforesaid houses and premises in good
 “ order and repair, and to renew and rebuild the same
 “ when necessary, or should he or they fail or make default
 “ in his aforesaid obligation of insuring the aforesaid
 “ houses and premises, and of assigning and delivering up
 “ the policies and renewal receipts thereof as aforesaid,
 “ that then and thereupon, in any of the aforesaid cases,
 “ should the said Julia Evans and Jane Evans, or either of
 “ them, see fit or deem it expedient, the present sale and
 “ conveyance shall become, be and remain, null and void.
 “ And that in any of the aforesaid cases happening, the said
 “ Julia Evans and Jane Evans, or either of them, are here-
 “ by authorised to take and prosecute all such proceed-
 “ ings in law as may be necessary or proper, as well to res-
 “ cind, annul and *make void the present sale and conveyance,*
 “ as to be re-instated in the absolute title and possession
 “ of the aforesaid described and sold property, and to
 “ recover and have all losses, damages, costs, expenses and
 “ interests suffered by them in the premises.” This deed
 received full execution.

On the 22nd. April, 1857, the same parties made ano-
 ther deed, wherein, after reciting the first mentioned deed,
 and another of a like nature of the 10th. February, 1852,
 by which another property was sold by the plaintiff and her
 sister to the defendant, for an annuity or life rent of £130 a
 year, and containing the same clause as the one above
 transcribed, and after reciting that the defendant was eight
 quarters in arrear of the annuities under both deeds, it was
 declared “ that they the said Julia Evans and Jane Evans
are unquestionably entitled forthwith to be reinstated in the
absolute title and possession of the property sold : ” The
 deed then proceeds as follows :

“ And whereas in order to avoid all further suits, con-

testations and proceedings at law, costs and charges in the premises aforesaid, they the said T. R. Smith, Julia Evans and Jane Evans, for themselves and their respective heirs and assigns have *transacted* and agreed as follows. That he the said T. R. Smith should and would *revoke* and grant with all warranties of law and right unto the said Julia Evans and Jane Evans, a certain part of the aforesaid described immoveable property therein-after specially described to be held by them in absolute property, and that by reason thereof the aforesaid annuity or life rent of £425, payable under and in virtue of the aforesaid deed of sale and conveyance of the 22nd. January, 1852, should be and remain diminished and reduced to the yearly sum of £210 10. That the said T. R. Smith, from and after the first day of May then next ensuing should and would punctually pay to the said Julia Evans and Jane Evans, quarterly, commencing on the 1st. August next, the aforesaid reduced yearly annuity or sum of £212 10, together with the entirety of the aforesaid yearly annuity or sum of £130, payable under deed of sale of the 10th. February, 1852, forming together an entire annual sum of £342 10, he the said T. R. Smith, remaining acquitted and discharged of and from all arrears of the aforesaid annuity or sum of £1100.—*And for securing the punctual payment of the aforesaid yearly sum of £342 10, quarterly, the said Julia Evans and Jane Evans should and would retain and have their hypothec and privilege of bailleur de fonds under and by virtue of the aforesaid deeds of sale and conveyance, respectively, and further that he the said T. R. Smith should and would assign, transfer and set over unto the said Julia Evans and Jane Evans, all and every the rents, revenues, issues and profits of the remainder of the said described property."*

Not long after the execution of this deed Miss Jane Evans died.

On the 4th. August, 1859, the present action was brought by the plaintiff, alleging that on the 1st. August, there was due to her £132 16 3, being five quarters of the annuity,

and setting forth the covenant or *pacte commissoire* in the deed of the 22nd. January, 1852, and praying that that deed might be set aside, and likewise the deed of the 23rd. April, 1857, in so far as necessary, and that the plaintiff be re-instated in the property and possession of the undivided half of the immoveable mentioned in the said deed of sale.

The defendant pleaded a *défense au fonds en droit*, which is now to be disposed of.

The action is brought upon the *pacte commissoire* to be found in the deed of the 22nd. January, 1852. And if that covenant subsists, uninfluenced by the retrocession of the 22nd. April, 1857, the action must prevail. It becomes necessary to analyse this last mentioned deed, and understand its character, in order to measure its effect by a true legal standard. After reciting the essentials of the deed of the 22nd. January, 1852, and particularly the covenant that the default on the part of the defendant to pay two quarters of the annuity should render void the said deed, and after reciting in the same manner the deed of the 10th. February, 1852, and alleging that eight quarters of the annuity under each deed were in arrear, it proceeds to lay down that the plaintiff and her sister, in consequence :—
 “are unquestionably entitled forthwith to be re-instated in the absolute title and possession of the property sold by them.” Here then is the fact stated that the defendant is in arrear not two, but eight quarters of the annuity, and the legal consequence, as the parties understood it, that the plaintiff was unquestionably entitled forthwith to be re-instated in the absolute title and possession of the property sold by her—it is upon these facts, and this view of the law, as applicable to them, that the parties plaintiff and defendant in order to avoid all further suits, contestations and proceedings at law, *transact* and agree that the defendant should *retrocede* one of the properties to the plaintiff, and that the annuity stipulated by the deed of sale of 1852, should for the future be reduced by one half, and the *retrocession* is thereby made—this deed contains a contract known to

our law by the name of a *transaction*, and is to be favorably viewed.—According to the parties, the plaintiff and her sister were unquestionably entitled to be re-instated in all the property they had sold to the defendant, but in *lieu* of insisting upon all they were entitled to, they compromise their rights under the *pacte commissoire*, and accept a retrocession of one of the houses, and reduce the rent or annuity to £212 10 a year.

The plaintiff and her sister did not forget to secure the payment of the annuity then established for the future at £342 10, for they stipulate that they shall retain their hypothec and privilege of *bailleur de fonds* under the “aforesaid deeds of sale and conveyance,” respectively, and further that the defendant should assign to them all and every the rents, revenues, issues and profits of the remainder of the property left to him ; and they further stipulate that they shall continue to occupy one of the houses at a rent of £50 a year as long as they please. The modified annuity is thus expressly secured by the hypothec and privilege of vendor under the old deeds, and upon the new security of the assignment of the rents and issues of the property remaining to the defendant.

This express stipulation cannot be set aside by the general words of style to be found at the conclusion of the deed, that there should be no novation of the original deeds, this can rationally be understood to mean nothing more than that the plaintiff's mortgage and privilege will date from the original deed, but cannot be interpreted to mean that the *pacte commissoire* contained in the original deeds should still be held to subsist after the *transaction* of the 22nd. April, 1857. As, in my opinion, the covenant upon which the action is brought has ceased to exist since the passing of the compromise of April, 1857, I hold that the *defense au fonds en droit* of the defendant is well founded, and that the plaintiff is without action against him of the nature of the one brought.

Judgment.... Considering that the demurrer or *défense en*

droit filed by the said defendant is well founded in law, and that the plaintiff hath no action upon the *pacte commissoire* contained in the deed of sale of the twenty second day of January, one thousand eight hundred and fifty two, the parties having compromised the same by the deed of the twenty second day of April, one thousand eight hundred and fifty seven, doth dismiss the plaintiff's action with costs.

ANDREWS and ANDREWS, for plaintiff.

LELIEVRE, for defendant.

VICE ADMIRALTY COURT.—LOWER CANADA.

Before :—Hon. H. BLACK, Judge, Vice-Admiralty Court.

THE LOTUS,—*Clark*.

For a collision occasioned by the mismanagement of a pilot, taken on board and placed in charge of a ship in conformity with the requirements of the law, enforced by a penalty, the vessel is not liable.

The mode, the time and the place of bringing a vessel to an anchor, is within the peculiar province of the pilot who is in charge.

When a vessel is lying at anchor, and another vessel is placed voluntarily by those in charge in such a position that danger will happen if some event arises, which is not improbable, those in charge of the second vessel must be answerable.

It is the practice of the Admiralty Court not to give costs on either side where the damages have been found to proceed from the fault of the pilot alone.

Sur collision occasionnée par l'impéritie d'un pilote pris à bord et mis en charge d'un vaisseau en conformité aux dispositions de la loi, sanctionnées par une pénalité, le vaisseau n'est pas responsable.

La manière, le temps, et le lieu de mettre le vaisseau à l'ancre, sont spécialement du ressort du pilote qui en a la direction.

Quand un vaisseau est à l'ancre, et qu'un autre vaisseau est volontairement placé par ceux qui en ont la direction de manière à ce qu'il y aura danger en certain cas, qui ne sont pas improbables, ceux qui ont la direction du second vaisseau sont responsables.

D'après la pratique de la Cour d'Amirauté il n'est accordé aucun frais où les dommages sont le résultat de la faute du pilote seul.

Judgment rendered the 19th. July, 1861.

This was a cause of damage by collision promoted against this vessel by the owners of the ship *Washington*; under the circumstances stated in the following judgment of the Court.

THE COURT, &c.—This suit is brought by James Bunten and James Bunten, Junior, both of Glasgow in Scotland, sole owners of the ship *Washington*, against the ship *Lotus*

owned by Henry Fry of Quebec, and Mark Whitwell and John Allward of Bristol, to recover damages arising out of a collision between those ships, which took place in the harbour of Quebec, on the 12th. of May last. The *Washington*, a vessel of the burthen of 989 tons, arrived at Quebec on the 11th. of May, about eight in the morning, having on board 620 tons of coal and 100 tons of ballast, and came to anchor opposite Dumlin's wharf on the Quebec side of the river, and about one-third of a mile from it, in about twelve fathoms water, and rode by her port anchor with about thirty fathoms of chain out; she lay in a safe berth clear of all other vessels, and swung with the tide without any difficulty. The *Lotus*, a ship of 824 tons burthen, arrived about four o'clock in the morning of the following day, being then in charge of a branch pilot who had come on board at Bic. She had a cargo of coals to be delivered at the Montreal Ocean Steamship Company's wharf, and her master wished her to be anchored as near as might be to that wharf, which is below Dumlin's wharf. She came to anchor above the *Washington*, and inside of her, but the exact distance at which she anchored from the *Washington* is disputed. When she anchored the tide was about slack after ebb, the vessels in port were in the act of swinging, the wind being from the east and blowing a fresh breeze. The *Washington* and the *Lotus* swung safely round with the flood without accident; they appear also to have swung safely round with the ebb. But soon after the tide turned to ebb, and about ten A. M. the *Lotus* broke her sheer, and, swinging outwards, came into collision with the *Washington*,—her port quarter striking the *Washington's* starboard bow,—and swung round with her side to the stream, the jib-boom of the *Washington* passing between the main and the mizzen masts of the *Lotus*; the anchors of both ships then dragged and they drifted together down stream, until they came into contact with the *Margaret Pollock*, which lay a short distance below them on the port quarter of the *Washington*. The *Washington's* port bow struck the *Margaret Pollock's*

starboard bow ; the *Margaret Pollock's* anchor also dragged, and the three vessels drifted together down the stream, and they afterwards became entangled, first with the *Kalos*, and then with the *Equity*, and the five vessels drifted together with a strong ebb tide until they were brought up by their anchors holding on the Beauport bank, at the west end of the Island of Orleans. In this collision the damage complained of was done to the *Washington*. The ships were not freed from each other until the flood, when they got clear with the assistance of their sails and of a tug steamer.

These are the undisputed facts of the case ; on certain other points the allegations of the respective parties, and evidence adduced by them, are more or less at variance. The owners of the *Washington* allege that the collision arose from the *Lotus* having come to anchor too close to the *Washington*, (about a ship's length from her), and having given the latter a foul berth, so that if she broke her sheer and swung towards the *Washington*, the latter could not avoid her ; and the collision, which actually occurred, must become inevitable. They allege also that the *Lotus* was under no necessity to anchor so close to the *Washington* ; but that on the contrary there was at the time the *Lotus* came to anchor, ample room for her to have taken such a position as would have avoided all risk of collision, and therefore that the damage was occasioned solely by the negligence or want of skill of the persons on board the *Lotus*.

On the part of the *Lotus* it is alleged in defence that she came to anchor at a proper and safe distance of from 120 to 130 fathoms from the *Washington*, and did not therefore give her a foul berth. That there was at the time of the collision a very strong breeze blowing from the eastward, and that at this time the *Washington* being light, had run ahead of her anchor, and was by this cause only brought so much nearer the *Lotus* that when the latter broke her sheer the vessels came into collision in consequence, and would not otherwise have done so. That the pilot in

charge of the *Lotus* used every endeavour and adopted all proper means to keep her steady, placing a man at the wheel, and sheering away from the *Washington* towards the Quebec shore, and setting the foretopmast sail to assist in keeping her steady; and that it was the violence of the wind, and not any fault or negligence of the persons on board her, which caused the *Lotus* to break her sheer. It is alleged also that when the *Lotus* canted across the *Washington*, the *Lotus* set all her jibs, and the foresail in order to get clear; and that the collision was occasioned solely by an accident, which those on board the *Lotus* could not avoid. It is also alleged that the *Lotus* was at the time of the collision, and at the time when she came to anchor, in charge of a branch pilot, who had been taken on board and placed in charge in conformity to the requirements of the law, and by whom all the movements of the vessel were directed. It is not alleged that there was not ample room in the harbour to allow the *Lotus* to anchor at a greater distance from the *Washington*; but only that the harbour was at the time so crowded with ships that it was impossible to anchor in any position near to the Montreal Ocean Steamship Company's wharf, and at a greater distance from the *Washington*.

The evidence adduced is to a certain extent contradictory. That of the master, chief mate, and four of the seamen of the *Washington* almost repeats the allegations of the libel, and in every respect supports it. The owners of the *Washington* have also examined the master, mate and one of the seamen of the *Margaret Pollock*, and the masters of the ships *Arran*, *Tara* and *Cuthbert*, whose evidence is also confirmatory of the allegations of the libel; and they all deny that the *Washington* ran up to or ahead of her anchor. There is no doubt that the *Washington* was at anchor first, and that the *Lotus* did not come in till the next day. The master of the *Arran* says he saw the two ships from the Durham Terrace on the morning of the collision, and observed that there would be mischief, and

that about a quarter of an hour afterwards he saw the *Lotus* drift down upon the *Washington*. The master of the *Margaret Pollock* says he saw the two ships from his own vessel, which lay near them, on the same morning, and that they were about half a cable's length from each other, and remarked that there would be an accident, unless the weather moderated. The master of the *Cuthbert* says that the *Washington* lay about two cables' length from the *Cuthbert*, and that the *Lotus* lay between them, but about half a cable's length closer to the *Washington*; that he also saw them on the morning of the collision, and that he saw the *Lotus* break her sheer, and drift down upon the *Washington*; that the *Lotus* sheered very badly, and that he saw a man steering her all the morning; that the *Washington* was very steady upon her anchor; and that the collision occurred through the fault and negligence of the persons on board the *Lotus*, and could not have been avoided by any thing to be done by the *Washington*. The master of the *Tara* says he saw the ships from his own, which lay near them. The *Lotus* was about a good ship's length ahead of the *Washington*, in an angular direction. That the *Tara* put a strong strain upon her chain with the ebb tide, and that the ships around him did the same, and showed no disposition to run up to their anchors. That he observed the *Lotus* sheer a great deal in the morning, and thought she was badly steered. That he afterwards saw the ships from the Durham Terrace, and saw the *Lotus* drift down upon the *Washington*.

On the part of the *Lotus*, the evidence consists of the master, mate, and five of the seamen of the vessel, the master and mate of the *Nicaragua*, and the pilot of the *Cuthbert*. The master of the *Nicaragua* says his ship was close to both, and that he observed them particularly. He does not think the *Lotus* gave the *Washington* a foul berth. He supposes that the *Washington*, being a light ship, was ahead of her anchor, the wind being sufficient to run any light ship up against the tide, for he did not observe her

drift down as the *Lotus* did. He saw the *Lotus* break her sheer, but from what cause he does not know. Immediately after she was checked by her anchor, she struck the *Washington's* bow. He observed that there would be an awful collision unless the *Washington* slacked her chain. He thinks the ships had a fair berth on the flood, and a foul one on the ebb, because he thinks the *Washington* ran ahead of her anchor. He is not prepared to swear that she did so, but thinks she must, because she was a light ship. The evidence of the mate of the *Nicaragua* is nearly to the same effect as the master's. The evidence of the master and people of the *Lotus*, and that of the pilot of the *Cuthbert* is in general confirmatory of the allegations of the defence; but the master says, "I did not apprehend any danger until the *Lotus* took a strong sheer, and the tide taking her on her broadside, swept her down towards the *Washington*." And the pilot of the *Cuthbert* says, that on the ebb the *Lotus* lay at about half a cable's length from the *Washington*, and on her starboard bow, and about a cable's length from the *Cuthbert*, and on her starboard quarter. On the morning of the collision he was coming to the *Washington* in a boat, and passed ahead of the *Lotus*. He saw her break her sheer, in spite of the efforts of the man who was steering her, and run towards the *Washington*; and when he saw that, he kept away from the *Washington* lest he should be jammed between the two ships. The *Lotus* was driving towards the *Washington* as if going to fall across her bows, and the *Washington* was running ahead of her anchor, with her bow towards Quebec. About two minutes after he first perceived the movements of the two vessels they came into contact. The *Lotus* hoisted her fore topmast stay-sail as soon as she broke her sheer. He says that half a cable's length is considered a fair berth, if the ships sheer on the same way, but it would not be sufficient if they were not sheered to the same side. There is no allegation on the part of the *Washington* that proper measures were not taken after the vessels came into collision.

There is the usual amount of discrepancy between the

allegations of the parties, and between the statements of their respective witnesses; but the weight of the evidence, and more particularly of the evidence of the witnesses unconnected with either vessel—taken with the admission of the master of the *Lotus*—and the undisputed facts of the case, would seem to shew that in his desire to meet the wishes of the master to lie as near as possible to the Montreal Ocean Steamship Company's wharf, the pilot of the *Lotus* brought her to an anchor nearer to the *Washington* than, under the circumstances it was safe or prudent to do; and in so doing he ran the risk of the occurrence of certain events of the probability of which it was his business to be aware, which in fact did afterwards occur, which he ought to have foreseen, and against which he ought to have taken precautions, but did not; and that it was by reason of the want of such foresight and precautions that the collision occurred. It is far from being proved that the *Washington* ran up to or ahead of her anchor, and the balance of evidence inclines to shew that she did not; those who say she did, support, if they do not found, their statement on the supposition that she was a *light* ship, but it is proved that she had on board 600 tons of coal and 100 tons of ballast, and as her tonnage was only 939, seven hundred tons would certainly prevent her being light. But whether she did or did not run up to or ahead of her anchor, her doing so was a possibility which the pilot in charge of the *Lotus* ought to have foreseen and provide against by giving her ample room, more especially as the wind was in the same quarter, and blew with about the same force when the *Lotus* came to anchor, as when the collision occurred. All the witnesses on both sides describe the *Lotus* as sheering heavily immediately before the collision, and at length breaking her sheer, and striking the *Washington*; and nearly all describe her as drifting down upon the *Washington* before striking her, a circumstance which seems to shew that she dragged her anchor, either from the strain arising from her heavy sheering and her breaking her sheer, or from her having been anchored with too little

chain out in order to avoid coming nearer the *Washington* or going further from the wharf at which she was to discharge. I am therefore of opinion that the collision was occasioned by the want of proper precaution on the part of those in charge of the *Lotus*, and her coming to anchor nearer to the *Washington* than the rules of good seamanship warranted under the circumstances. It is clear that when a vessel is lying at anchor, and another vessel is placed voluntarily by those in charge, in such a position that danger will happen if some event arises, which is not improbable, those in charge of such second vessel must be responsible for such damage. (1)

While, however, I am of opinion, that the collision was occasioned by the fault of those in charge of the *Lotus*, I am also of opinion that the person in charge was a branch pilot ; and this brings me to the point urged in the defence, that the *Lotus* was at the time of the collision and for some days before, not in charge of the master or of any person employed or engaged by him or by the owner, but was in the charge and under the control of Louis Asselin, a branch pilot for and below the harbour of Quebec, who was taken on board and placed in charge of the ship, in conformity with the requirements of the law ; and that during all that time the movements of the vessel were directed by such pilot. Now, by the act 12 Vic., c. 114, to consolidate the laws relating to the powers and duties of the Trinity House of Quebec, and for other purposes, founded on a bill brought in by the Honorable Joseph Cauchon, (the present Commissioner of Public Works), the former laws respecting pilots, for and below the harbour of Quebec, were repealed, and new provisions made ; and by the 55th section of Mr. Cauchon's Act, which is the law now in force, it is enacted, " That the master of any vessel arriving within the port of Quebec, and not having a branch pilot on board, who shall perceive at a reasonable distance, the boat or other small craft of a branch pilot, carrying at the

(1) *The Lidaskjalf*, Swabey's Rep., 119.

mast head the distinctive pilot flag, shall, by lying to, if the weather permit, or by shortening sail or other practicable means, facilitate the coming on board of such pilot, and shall give him charge of his vessel, under a penalty not exceeding ten pounds, over and above the full pilotage which shall be payable to such pilot as shall have shewn by sign or otherwise his intention to board the vessel and take charge thereof." This is undoubtedly a compulsory enactment, sanctioned by a penalty, and obliging the master to take a pilot, and to give him charge of his vessel and making it unlawful to refuse to do so. In the recent decisions in the Court of Admiralty in England, it has been laid down as a settled principle that where the taking of a pilot is compulsory upon the master of a vessel, the owners are not liable for damages occasioned by the fault or incapacity of such pilot. In the present case I think it has been sufficiently shewn that the collision was occasioned by the sole fault of the pilot of the *Lotus*, who was in charge of that vessel; for, it is, I apprehend, an established principle of law that the mode, the time, and the place of bringing the vessel to an anchor is within the peculiar province of the pilot who is in charge; (1) and there is no allegation or proof that the master of the *Lotus* in any way interfered with or controlled the pilot in the performance of this duty.—Upon the rules of law adopted by the Court of Admiralty in England, it appears therefore that the owners of the *Lotus* are not liable for damages in this case, whatever be the recourse which the owners of the *Washington* may have against the pilot, or, (under the late Act), against the corporation of pilots who receive the pilotage. The English decisions upon this point have been given independently of the express provision in the several British acts, 52 Geo. III, c. 39, s. 30;—6, Geo. IV, c. 125, s. 55; and 17 and 18 Vic., c. 104, s. 188; which adopt the principle of the decisions above referred to, and enact

(1) *The Agricola*, 2 W. Rob. 10:—*The George*, Ibid. 386:—*The Gipsy King*, Ibid. 537:—*The Christiansa*, 7 Notes of Cases 7:—*Hammond vs. Rogers*, 7 Moore's P. C. Rep. 171:—*The Admiral Boxer*, Swabey 193:—*The Argo*, Ibid. 462.

that the owner shall not be liable in the case before mentioned. (1) In this principle, which is simply, that no one can by law be responsible for the act of a person to whom he is compelled by law to give up the charge of his ship, and in whose appointment he has no voice, and over whose actions he has no control,—I cannot but concur; and it appears to me that it must apply to and govern the present case; as Dr. Lushington observes, “where the appointment rests with the owner himself, as in the case of the master and crew, it is reasonable that he should be held responsible for their acts who are agents selected by himself; and he is bound to provide persons of adequate skill, diligence and sobriety. But where a person is compulsorily put on board the vessel, and the owner’s authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any possibility of interference.” Lord Ellenborough, in *Carruthers vs. Sydebotham*, and Lord Wensleydale, in *Lucey vs. Ingram*, have stated the same doctrine as law. I must here observe that, before the passing of Mr. Cauchon’s act, the law did not make it compulsory upon the master of a vessel coming into the port of Quebec to take a pilot, but merely provided that if he did not take the pilot who first offered his services, he should pay such pilot one-half of the usual pilotage, apparently as a compensation for the trouble to which he had been put by coming to the vessel. (2) There was no penalty, or any provision making it unlawful not to take the pilot, and give him charge of the vessel, as there now is. Any decision

(1) *The Protector*, 1 W. Rob. 45 :—*The Maria*, Ibid. 95 :—*The Agricola*, 2 W. Rob. 10 :—*The Montreal*, 17 Jurist 539 :—*The Admiral Boxer*, Swabey 195 :—*The Argo*, Ibid. 462 :—*The Ticonderoga*, Ibid. 217 :—*Carruthers vs. Sydebotham*, 4 M & S, 77 :—*Lucey vs. Ingram*, 6 M. & W. 314 :—*The Carolina*, 2 Curtis R. 71 :—*The Johanna*, Stoll, decided by Dr. Lushington, 21st. March, 1861

(2) 45 Geo. III, c. 12, s. 13.

therefore of this Court, or of any other Court in Lower Canada with respect to the liability of the owner of a vessel for damage done by her while in charge of a pilot, given before the passing of Mr. Cauchon's act, though perfectly correct at the time when it was given, would not be so if given under the law as it now stands, after having been subjected to the important changes made by the present act. This case, and the considerations which arise out of it, will shew the immense importance and responsibility of the office of pilot, and the necessity which exists that the utmost care and attention should be given by the authorities who make the appointment, to see that none are appointed but those who possess the requisite qualifications and character, since it has pleased the legislature to give to those whose property is to be placed under the sole charge of a pilot, no power to select one in whom they have confidence or to refuse one in whom they have none.

I therefore dismiss the owners of the *Lotus* from the present suit, but following the precedents established by Dr. Lushington in the High Court of Admiralty of England, in cases where the damages have been found to proceed from the fault of the pilot alone, (1) confirmed by the decision of the Privy Council, as delivered by Lord Kingsdown in the case of the *Lochlibo*, (2) I dismiss the suit without costs.

JONES and HEARN, for promoters.

HOLT and IRVINE, for defendants.

(1) *The Maria*, 1 W. Rob. 111 :—*The Agricola*, 2 W. Rob. 21 :—*The George*, *Ibid.* 390 :—*The Atlas*, *Ibid.* 506 :—*The Admiral Boxer*, Swabey 197 :—*The Argo*, *Ibid.* 468.

(2) *Pollock vs. McAlpine*, 7 Moore's P. C. Rep. 435.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE }

Before:—SIR L. H. LaFontaine, Bart., Chief-Justice,
 AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

McDOUGALL..... *Appellant.*
 and

THE CORPORATION OF THE PARISH OF ST.
 EPHREM D'UPTON..... *Respondents.*

Held, in the Superior Court, St. Hyacinthe:—That the Superior Court has no jurisdiction to amend, alter, revise or disallow any by-law of a municipal corporation, although passed illegally, and contrary to the just rights of the parties interested, unless redress is sought under the 12th. Vic., ch. 41.

In appeal:—1o. That under "The Lower Canada Municipal and Road Act of 1865," a municipal council is not authorized to cause a sale by auction, *aux rabais*, to be made of the road work of a proprietor of lands, within the municipality, and to cause such lands to be sold, after notice in the *Canada Gazette*, for the price of the making of such road, without judicial proceedings.

2o. That the proprietor of such lands has a right of action in the Superior Court to prevent the corporation from so illegally advertising and selling his lands.

3o. That, in such action, the Court will declare the advertisements in the *Canada Gazette* illegal, and condemn the corporation to desist from troubling the plaintiff in the possession and enjoyment of his lands, by causing the sale thereof to be made without judicial authority, and to nominal damages for its illegal acts.

Jugé, dans la Cour Supérieure, St. Hyacinthe:—Que la Cour Supérieure n'a aucune juridiction pour amender, changer, reviser, ou rejeter aucun règlement d'une corporation municipale, quoique passé illégalement, et en contravention aux justes droits des parties intéressées, à moins que ce ne soit en vertu des dispositions de la 12me Vic., ch. 41.

En appel:—1o. Que sous "l'Acte des municipalités et des chemins du Bas-Canada de 1865," un conseil municipal n'est pas autorisé à vendre publiquement, au rabais, les travaux des chemins qu'un propriétaire de terres est tenu de faire dans la municipalité, et de faire vendre ses terres pour le coût de tels chemins, après avis dans la *Gazette du Canada*, mais sans procédés judiciaires.

2o. Que, le propriétaire de telles terres a un droit d'action dans la Cour Supérieure pour empêcher la corporation d'annoncer et vendre ses terres illégalement.

3o. Que, dans telle action, la Cour déclarera les annonces dans la *Gazette du Canada* illégales, et condamnera la corporation à ne point troubler le demandeur dans la possession et jouissance de ses terres, en les faisant vendre sans aucune autorité de justice, et aussi en dommages nominaux pour ses actes illégaux.

Judgment rendered the 7th. June 1861.

This was an action brought by the appellant, who resides in England, against "The corporation of the Parish of St. Ephrem d'Upton," in the district of St. Hyacinthe, alleging that he was troubled in the possession of seven and a half lots of land in the Township of Upton, belonging to him the appellant, which lots had been advertized and sold by respondents for municipal rates on the 7th February, 1859.

The respondents had appointed one Duhamel to examine and lay out a road which affected the lands in question, and his report made to the municipality on the 1st. August, 1857, was homologated on the 7th. December, 1857, with a proviso that the road should not be opened at the time mentioned in the report, nor until applied for by the parties interested. On the 3rd. May, 1858, this proviso was repealed by the council, who caused the making of the road to be given out by contract to the lowest bidder, and for the contract price (\$1609 ~~16~~) caused the appellant's lands to be sold after notice published in the *Canada Gazette*. The appellant served a protest on the respondents setting up his objection to the tax, and offering to try its legality in any Court of competent jurisdiction, and afterwards instituted his action in the Superior Court, St. Hyacinthe, setting up the facts, alleging the *trouble de droit*, and the nullity of the *procès verbal*, and of the acts of the council and their officers, on grounds, the chief of which are sufficiently disclosed in the remarks of the judges in appeal, praying by the conclusions of his declaration, that the respondents be condemned to desist from troubling the appellant in the peaceable enjoyment of his lands; that the land be declared free from all municipal assessments and burdens, dues and penalties; that the respondents be compelled to desist from the sale of the lands, and pay the appellant \$2000 damages.

To this action the respondents pleaded; that even if the report of Duhamel was irregular as well as the proceedings of the municipal council in respect thereof, yet the council had the right to levy and raise by the sale of the lands the sum expended to make the road in question; that the appellant's lands were by law charged with the making of the road, which was a front road; that the respondents had caused the road to be made at the appellant's cost in consequence of his neglect to comply with the law, which expense, apart from any *procès verbal* or municipal regulation, might be recovered from any proprietor of lands

so in default ; that, moreover, the appellant should have appealed to the municipal council of the county of Bagot within which the lands were situate ; that the making of the road had been put up to public competition ; that the price was a reasonable and fair price, and that the work had been advantageous to the appellant, and was paid for by the municipality or its officers, and the appellant was bound to reimburse the sum so paid.

On the 25th January, 1860, the judgment appealed from was rendered, McCORD, Justice, in the Superior Court, St. Hyacinthe : " Considering that the Provincial Statute " intituled " The Lower Canada Municipal and Road " Act of 1855, " and its amendments, has given no " appealable jurisdiction to revise, alter, amend or disallow " any by-law passed by any municipal council, or corporation, even though such may have been passed illegally, " or contrary to the interests and just rights of the parties " interested ; and considering that this Court can only take " cognizance of any alleged illegality, injustice or irregularity in any by-law made and passed by any such corporation, under and by virtue of its supervising power " over all inferior tribunals and jurisdictions, therefore any " party so considering itself injured or aggrieved, can only " seek redress under the provisions of the provincial statute " 12 Victoria, cap. 41, and this Court doth consequently " dismiss the present action, with costs, *sauf à se pourvoir*."

MEREDITH, Justice.—Of the objections urged by the appellant, the two which seem to be of the greatest weight are, *firstly* :

That the respondents had no right to make the second order, namely, that of the 3rd of May, 1858, with respect to the homologation of the *procès-verbal* of the road in question, without notice to the parties interested.

The 2nd sub-sec. of section 49 of the 18th Vict., c. 100, provides that every municipal council before proceeding to the examination or revision of any *procès-verbal*, " shall cause

“ public notice to be given through their secretary-treasurer,
 “ to the inhabitants of the municipality or municipalities
 “ interested in the work to which such *procès-verbal* relates,
 “ of the day, hour, and place at which the council shall
 “ proceed to the examination or revision of such *procès-*
 “ *verbal*. ”

Section eight, of the same statute, defines how such notice shall be given.

In conformity to these provisions of the statute, the defendants gave notice of the time and place at which they were to proceed, for the first time, to the examination and revision of the *procès-verbal* in question; and upon that occasion, namely, on the 7th day of December, 1857, they homologated the *procès-verbal*; subject however to a proviso in these terms: “ Que le dit chemin, au lieu d'être fait dans
 “ le temps mentionné au dit rapport, ne le sera que lorsque
 “ ce conseil en sera requis par les intéressés au dit chemin,
 “ et lorsqu'il le jugera nécessaire.”

Some months afterwards, a petition was presented to the council, by three persons alleging themselves to be proprietors of land in the 19th range of Upton, and praying that the road in question might immediately be made.

This petition bears date the 1st of May, 1858, and two days afterwards, without, on this occasion, hearing any of the parties bound to make the road, and without notice to any of them, the municipal council made an order in the following terms: “ Il est ordonné que l'amendement du
 “ rapport du député, fait et passé à ce conseil le 7 décembre
 “ dernier, (1857) soit par les présentes annulé, et que le
 “ dit chemin soit fait, tel qu'ordonné par le rapport du
 “ député de ce conseil en date du 1er août 1857.”

Without wishing to enter, at any length, into the question of the reasonableness of the order thus made, I may observe that according to that order the parties had less than two months to make the road to which it refers; whereas, counting from the date of the *procès-verbal*, the parties

under it would have had nearly a year to do the same work ; and as regards the appellant, the effect of the second order was to require him, in less than two months, to make a road which cost \$1609 ^{ftt.}

On the part of the appellant it is contended that by the 49th section of the 18th Vict., Cap. 100, the municipal council of Upton were bound to give public notice before they proceeded again to the consideration of the *procès-verbal* in question, and that as they did not do so, the *procès-verbal* cannot be considered to have been legally homologated. And in support of this view, it may be said, that the order homologating the *procès-verbal* was not, in reality, the first order, which postponed the doing of the work ; but was the second order, which required the work to be done ; and which second order was made without any notice to the parties.

On the other hand, it may be answered, that the council did give notice of the time and place at which they were to proceed to the examination of the *procès-verbal*, and therefore that they did all the law required them to do ; that the reconsideration of the *procès-verbal* was a proceeding within their own discretion, in relation to which the statute did not subject them to any formality, and that therefore the want of a notice of the second meeting ought not to be deemed fatal. I think it would have been more in accordance with the spirit of the law, if the council, before finally ordering the work to be done, had afforded the parties interested an opportunity of being heard with respect to the change proposed to be made in their first order, and had this been done, it is not probable that the council would have required the appellant to make, in less than two months, a road which has cost \$1609 ^{ftt.}

But as a second notice was not required by the letter of the statute, and as the *procès-verbal*, in so far as it relates to the road in question, merely required the performance of a duty, to which the parties would have been equally bound

if there had been no *procès-verbal*, I think we cannot say it was necessary, *à peine de nullité*, to give notice of the meeting at which the *procès-verbal* was reconsidered, and the second order made. In fact the first order of the council relieved the appellant, for a time, from a common law liability, and the second order changed the first, only in so far as it was an indulgence to the appellant.

The other of the two objections urged by the appellant to which I have alluded, has reference to the manner in which the respondents caused the work in question to be done.

Under the 60th section of the statute "the overseer of roads" could have "caused the work to be done by some other person;" and in that case the overseer might have recovered the value of the work done from the appellant "with 20 per cent in addition thereto, and costs of suit, as "a debt due to such overseer," or such amount might have been levied "as arrears of taxes due to the municipality in "the manner herein after provided."

If the municipality had caused the front road of the appellant to be made in the manner directed by the foregoing section, it appears they would have had a right to recover the value of the work, in the manner attempted in the present instance.

But instead of causing the road to be made, as the law directs, by the *overseer of roads*, the municipal council ordered the *inspector of roads* to sell the making of the road by auction, "*au rabais suivant la loi*;" and this accordingly was done.

In making this order the council seems to have had in view the 65th section of the statute (18 Vict., Cap. 100) which sanctions the proceeding so ordered "in the execution of *county works*;" but there is nothing in the statute to authorize the pursuing of that course in a case such as that before us, when the work was to be done by private individuals.

It may be said that the appellant has no interest in complaining of the work having been given out by contract, if it was done at as low a price, in that way, as it could have been done in any other. That is true ; but what the appellant has a right to complain of is, that the municipal council having made his road in a manner different from that prescribed by law, have advertised his lands for sale, without any judicial proceedings, and have thus excluded all inquiry, as to whether he has, or has not, suffered by their deviation from the law. And here it may be observed that there is a very important difference between the position of a road overseer causing work to be done under the 60th or 61st section of the statute either by the day, or by the job, and the position of an officer of the municipal council acting under a positive order of the council, directing him at a particular time, to dispose, without reserve, of work by public auction to the lowest bidder, in the manner provided by the 65th section of the statute. In the first case the officer is bound to exercise his discretion, with respect to the reasonableness of the prices to be given ; whereas in the second case, the officer cannot exercise any such discretion. The effect therefore of the order of the council directing the making of the road to be disposed of by auction, was to deprive the appellant of the advantage of the discretion which, it is to be presumed, the road overseer would have exercised had the work been done by him.

Again, if the work had been done as the law requires, by the road overseer, and that that officer either from fraud, or neglect of duty, had paid more for the work than he ought to have done ; the appellant would have had his recourse against the overseer ; whereas that officer has been discharged from all responsibility as to the cost of the work by the course pursued by the respondents.

It may also be observed that there seems to be a good reason for the distinction made by the legislature, allowing county works to be adjudged by auction to the lowest bidder,

without at the same time allowing work which ought to have been done by a private individual, to be given out in the same way. Where the performance of a county work is disposed of by auction, a number of persons have an interest in attending at the sale, and seeing that the work is adjudged at a reasonable price, but where the work to be done is of a private nature, and, as often is the case, is chargeable against a single person, if he happen to be absent, his interests may be wholly unprotected; and in such a case, he would have to pay, *not according to the value of the work done*, but according to the *price* which the persons present at the auction *might think fit to charge*.

The legislature may declare that a party chargeable for work shall pay for it, not according to its value, but according to what other persons may be willing to offer to do it for; and this, even, irrespective of the reasonableness or unreasonableness of their offers; but no power less than that of the legislature can cause the liability of a person in default to be determined in a way such as that just mentioned; and the legislature has not done so with respect to cases such as that before us.

The statutory power given, in certain cases, to municipalities, of selling the lands of persons indebted to them, without any judicial proceedings in that behalf being necessary, is one of an unusual and exceptional character; and a municipality seeking to exercise such a power, ought to follow carefully the course prescribed by the legislature.

The respondents have not done so in the present instance, on the contrary they have caused the work to be done in a manner differing materially from that directed by the statute, and I therefore think they are not entitled to the exceptional remedy of selling the lands of the appellant merely by their own authority.

Let the respondents bring an action for the cost of the work done; if in such an action it be proved that the work, in consequence of its having been done in a manner

different from that ordered by the statute, has not cost more than it ought to have cost, the respondents will recover the full amount of their claim ; and if, on the other hand, it be proved that the sum expended is more than the work would have cost, had the directions of the statute been pursued, then the respondents will be entitled to recover, not the cost price, but the reasonable value of the work done for the appellant.

But the respondents cannot be allowed first, to make the road in a manner different from that which the statute directs, and then to sell the lands of the appellant by an exceptional proceeding, which would deprive the appellant of any opportunity of showing that he is really aggrieved by the irregularities of which he complains in the proceedings of the respondents.

As to the remedy adopted by the appellant ; after giving this point my best consideration, I cannot concur in the view taken of this part of the case, by the learned judge in the Court below.

It seems to me that if the respondents had no right, without a judgment of a competent Court, to sell the lands of the appellant, that the latter must have a right to put a stop to the illegal proceedings of the former ; and if the appellant had a right to stop those proceedings, I know of no other means by which he could effectually have enforced that right, than by an action in the Superior Court, to the superintending and reforming power of which " all bodies " politic and corporate in Lower Canada," are by-law expressly subjected.

The learned counsel for the respondents contended that even if the appellant had reason to complain, his only remedy was that given by the 8th section of the 12th Vic. Cap. 41. But the appellant could not have obtained redress under that provision of law, without the intervention of Her Majesty's Attorney-General ; and I certainly am not prepared to hold that the intervention of the Attorney-Gener-

ral can be necessary to prevent one party from illegally putting up to public auction, under color of law, the property of another.

I therefore think that the appellant is entitled to the reversal of the judgment of the Court below.

MONDELET, Justice.—The appellant conceiving that the corporation, the respondents, unduly and illegally, by taxation, and advertisement of sale of several of his lots of land had wronged him, instituted, after due protest, an action against the respondents, alleging a *trouble de droit* in the possession of his lands, and oppression, and concluding that the respondents should be condemned to desist from troubling him, the appellant, in the peaceable possession and enjoyment of his lands ; that the said lands should be declared free from all municipal assessments and burdens, dues and penalties, and that the respondents be condemned to desist from the sale of the said lands and pay the appellant \$2000 damages.

His action was met by a two fold pretension :

1o. No such right of action ; proceedings of the corporation supreme ; no other course than an appeal to the county council.

2o. Proceedings of the respondents regular and legal.

As to the first question, it may simply be remarked that the respondents, as a corporation, possess none but exceptional powers, if they have transcended those powers, their proceedings are null, and should be treated as such. Consequently the appellant could not either appeal to the county council, or bring the case before the Superior Court, under the operation of the 12th Vict., cap. 41.

He may at once complain of the *trouble* he has met with at the hands of the corporation, treat their proceedings as nullities, and pray as he has done by his conclusions.

As to the second pretension set up by respondents, it is

untenable. The *procès-verbal*, not having been regularly homologated for want of the necessary notice, must go for nothing. Besides, the road being ordered in a definite way, and it being any thing but explicit, is not susceptible of being properly carried out.

The principle of thus trying such questions, by an action, has already been recognised in the case of *Gould vs. The Corporation of Montreal*. (1)

I am of opinion that the judgment of the Court below should be reversed, and the action of the appellant maintained.

Judgment.—“ Seeing that the said defendants caused the road-work mentioned in the pleadings in this cause filed, to be performed by disposing of the said road-work by auction, *au rabais*, as appears by the order made by the municipal council of the municipality of the parish of St. Ephrem d’Upton, on the twenty eighth day of June, one thousand eight hundred and fifty eight, and also by the return of Olivier Tremblay, an officer of the said council, bearing date the nineteenth day of July, one thousand eight hundred and fifty eight, produced by the said defendants as part of their exhibits, number eleven; and considering that according to the laws in force in Lower-Canada at the time of the performance of the said road-work, and more particularly under “ The Lower-Canada Municipal and Road Act of 1855,” the defendants were not authorized to cause the said road-work to be performed in the said manner; and that although the said defendants may have a right to recover from the said plaintiff, in the ordinary course of law, the fair and reasonable value of the work which they the said defendants so caused to be performed on the lands of the plaintiff, in consequence of the plaintiff not having caused the said work to be performed; yet, that the said defendants had not a right, of their own authority merely, and without the intervention of any judicial pro-

(1) 2 L. U. Jurist, 260.

ceedings, to proceed to sell the lots of land belonging to the said plaintiff, upon which the said defendants had so caused the said road-work to be done, as the defendants appear to have done, by causing the said lots of land to be advertized for sale in the *Canada Gazette*, as mentioned in the plaintiff's declaration ; and considering therefore that the said plaintiff had reason to complain of the proceedings taken by the defendants for the purpose of selling the said lots of land of their own authority, and that the said plaintiff had a right of action to have the said proceedings on the part of the defendants declared illegal, and to prevent the said defendants from illegally selling the said lots of land belonging to him the plaintiff ; and considering therefore that in the judgment of the Court below dismissing the plaintiff's action instituted for the said purposes, there is error ; the Court doth in consequence reverse the judgment of the Court below, to wit, the judgment rendered in this cause by the Superior Court at St. Hyacinthe, on the twenty fifth day of January, one thousand eight hundred and sixty ; and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth hereby declare the appellant to be the lawful proprietor of the lots and portions of land in his declaration described and mentioned, that the advertisements which the defendants have caused to be inserted in the *Canada Gazette* respecting the sale of the said lots of land belonging to the appellant are illegal, and the defendants are hereby adjudged and condemned to desist from troubling the said plaintiff in the peaceable possession and enjoyment of the said lots of land, by assuming to cause the same to be sold without judicial authority, and to desist and wholly surcease from the sale of the said lands, or any portion thereof, and to pay to the appellant five shillings currency as and for damages by him sustained by the wrongful acts of the respondents in the premises, together with all costs.

SANBORN and BROOKS, for appellant.

LAFLAMME, LAFLAMME and DALY, for respondents.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 1066. { ADAMS..... *Plaintiff.*
 { vs.
 { O'CONNELL..... *Defendant.*
 { and
 { O'CONNELL, *ès qualités*..... *Opposant.*

Held :—That under the 37th. sec. of the 4th. Vic., Chap. 30, the dower to which children are entitled attaches :

1o. To lands, tenements &c., in the possession of their father at the time of his decease :

2o. To lands, tenements &c., which have been in the possession of the father, and in relation to which the mother has not barred or released her dower, under the provisions of the 35th. section of the statute above cited. (1)

Jugé :—Qu'en vertu de la 37me sec. de la 4me Vic., Chap. 30, le douaire des enfants se prend :

1o. Sur les terres, propriétés etc., en la possession du père à l'époque de son décès :

2o. Sur les terres, propriétés etc., qui ont été dans la possession du père, et par rapport auxquelles la mère n'a pas déchargé ou éteint son douaire, en vertu des dispositions de la 35me section du statut ci-dessus cité.

Judgement rendered the 3rd. December, 1860.

STUART, Justice.—The defendant, in his quality of tutor, files in the present case an opposition *afin de conserver* on behalf of his minor children, and alleges that the property sold in this cause is liable towards the minors for the *douaire coutumier*, he likewise sets up a claim to £125. The opposant concludes for the payment of the £125, out of the proceeds of the sale, and also that they be collocated : “ en vertu du droit des dits enfants mineurs au dit “ douaire coutumier a eux appartenant, laquelle collocation sera faite suivant la loi.”

The opposition therefore seeks to secure their rights of dower, and also the payment of a sum of £125, alleged to be due to them as heirs of their deceased mother.

To this opposition the plaintiff filed a *defense au fonds en droit* which the Court is called to adjudicate upon—the principal grounds are :

(1) Con. Stats. Cap. 37, secs 52-53.

10. That there is no allegation of the death of the father of the defendant.

20. That it is not alleged that the defendant was seized of the property sold at the time of his decease.

30. That it is not alleged that the mother had not barred her dower.

The question raised is upon the interpretation to be put upon the 37th. sec. of 4th. Vic., cap. 30.

By the 35th. sec. of this law married women are permitted to join with their husbands in the alienation of lands which may be liable for their legal or customary dower, and to release such dower :—up to the time of the passing of the 4th Vic., Cap. 30, married women could not bar their dower.

The 37th. sec. indicates the property which thenceforward will be liable to the children for the legal or customary dower—“ the legal or customary dower, and the right to legal and customary dower of the child &c... shall be had and exercised, solely and exclusively, upon and in respect of *lands, tenements, real or immoveable estates, subject to the dower of his, her or their mother, whereof his, or her father was seized and possessed at the time of his death, and also upon and in respect of those on which the dower and right of dower of his, her or their mother, may not have been by her released or barred, during the continuance of her marriage, and not upon any other lands and tenements, real or immoveable estates whatsoever, any law &c.*

This clause merely confirms the disposition of the 35th. section, by stating that the children's dower shall attach to the property in the possession of the husband at the time of his decease, and also upon such as the mother may not have barred and released her dower, and upon no other—this is merely excluding from the operation of the dower such property as may have been released by the mother under

the authority she derives from the 35th. clause—in other particulars the law stands as it stood before.

The *défense au fonds en droit*, in this view of the case, is not founded in law, and must be dismissed.

The demurrer was dismissed “considering that the reasons assigned by the said plaintiff in support of his said *défense au fonds en droit* are insufficient in law to support the same.”

CAMPBELL and KERR, for plaintiff.

BOSSÉ and BOSSÉ, for opposant.

QUEEN'S BENCH, }
IN APPEAL. } DISTRICT OF MONTREAL.

Before :—SIR L. H. LAFONTAINE, Bt., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

QUENTIN DIT DUBOIS..... *Appellant.*

and

BOSTON..... *Respondent.*

Under a writ of *saisie revendication*, the sheriff seized certain moveables in the possession of the defendant, which moveables were, on the petition of plaintiff, before the return of the writ, sold by the sheriff, and the proceeds thereof, £208 18 5, returned into Court. Part of this sum was paid by order of the Court to an intervening party, as privileged creditor of the defendant, and the balance, £84 2 7, remained in the sheriff's hands. The parties plaintiff and defendant afterwards entered into a settlement before notaries, by which the plaintiff agreed to withdraw his suit, and all matters in dispute between them were put an end to.

Upon this, judgment was rendered putting the parties out of Court, without costs.

The defendant then brought his action against the sheriff for the £84 2 7, and the sheriff brought into Court and deposited £9 19 11, which he tendered to the plaintiff as the balance of the monies in his hands, after deduction of his costs and disbursements, as well on the execution of

Dans une action en revendication le shérif saisit certains meubles dans la possession du défendeur, lesquels meubles furent, sur requête du demandeur, avant le rapport du writ, vendu par le shérif, et le produit d'iceux, £208 18 5, rapporté en cour. Partie de cette somme fut payée par ordre de la cour à un intervenant, comme créancier privilégié du défendeur, et la balance, £84 2 7, resta entre les mains du shérif. Subséquentement les parties à l'action transigèrent par devant notaires, par la transaction le demandeur s'obligea de retirer son action, et toutes matières en litige entre les parties furent finalement réglées.

Sur ce, jugement fut rendu mettant les parties hors de cour, sans frais.

Le défendeur porta alors son action contre le shérif pour la somme de £84 2 7, et le shérif rapporta en cour et déposa £9 19 11, qu'il offrit au demandeur comme la balance des argents entre ses mains, après déduction de ses frais et déboursés, tant sur l'exécution du writ de

the writ of *revendication*, as on the sale of the moveables.

Held:—1o. That the sheriff had the right to deduct all necessary expenses incurred by him upon the sale of the goods.

2o. That the parties having based their settlement upon the sheriff's return, and not having contested it, the return would be held good, and the parties having agreed that the *saisissant* should withdraw his action, each party paying his own costs, the *saisi* transferring whatever right he had in the goods to the *saisissant*, he the *saisi* could not afterwards, as plaintiff, recover from the sheriff more than the sum tendered.

Semble, that the abstract question, as to whether the sheriff had, or had not, a right of *retention* or *lien* upon property seized *en revendication* where the action is dismissed, was not to be considered as decided upon the appeal.

revendication, que sur la vente des meubles.

Jugé:—1o. Que le shérif avait droit de déduire tous frais nécessaire encourus par lui sur la vente des effets.

2o. Que les parties ayant basé leur transaction sur le rapport du shérif, et ne l'ayant pas contesté, le rapport devait être maintenu, et les parties étant convenues que le demandeur retirerait son action, chaque partie payant ses frais, le *saisi* transportant tout droits qu'il pouvait avoir au *saisissant*, il, le *saisi*, ne pouvait par après, comme demandeur, recouvrer du shérif plus que la somme offerte.

Il semble, que la question de savoir si le shérif avait, ou n'avait pas, un droit de gage ou de retention sur les effets saisis et revendiqués, lorsque l'action est renvoyée, ne devait pas être considérée comme décidée sur l'appel.

Judgment rendered 7th March, 1861.

The facts of the case will sufficiently appear from the remarks of the Judges.

In the Superior Court Montreal. SMITH, Justice.—This is an action brought against the sheriff of this district to recover the value of certain moveables seized by writ of *saisie-revendication* upon the now plaintiff, Dubois, who was defendant in a case brought against him by one Desjardins. The moveables were sold under order of the Court, and part of the proceeds were distributed in the same way as if the monies were levied under a writ of execution. The parties then settled their difference by a notarial transaction or *compromis*, Desjardins thereby agreeing to withdraw his action, each party to pay his own costs, and Dubois then cedes and transfers all his right in the property to Desjardins. This *compromis* being produced, by the defendant, Dubois, in the case *en revendication*, a judgment was rendered putting the parties *hors de cours*, each paying his own costs.

Dubois then turns round and brings his action against the sheriff, demanding the whole of the monies left in his

hands, without regard being had to the costs incurred either on the writ of *revendication*, or by the sale of the goods under order of the Court. As to the costs of sale, the sheriff uniformly retains them in case of sales on execution, and in this case, he was justified in doing so. As to the costs on the writ of *revendication*, the parties had adopted the report of the sheriff, they had filed no contestation of it at least, and, under the circumstances, he did not see that the sheriff could be turned over to his recourse against the *saisissant* after such a settlement, and without any decision as to the party really entitled to the goods.

“ Considering that the said plaintiff hath failed to establish, by reason of any thing alleged in and by the plaintiff's declaration, any right in law to have or maintain the conclusions by him taken in his said action ; and considering further, that the said defendant hath established his right in law to deduct from the proceeds of the sale of the goods and chattels ordered to be sold by the interlocutory order of the 3rd day of August, 1856, all the necessary expenses incurred by him, in effecting the sale of the said goods and chattels, in virtue of the said order, and according to its provisions ; and further considering that the defendant hath fully established by legal and sufficient evidence that there is now in his hands, a balance only of the said sum £9 19 11, arising out of the proceeds of the sale under the process of *revendication*, and all the proceedings had thereon ;—and further considering that the said plaintiff hath failed to establish in law a right to claim any greater or further sum, than the said sum of £9 19 11, by reason of any thing contained in his declaration ; and further considering that the said defendant hath tendered to the said plaintiff the said sum of £9 19 11 by his plea, filed to this action, and hath deposited, *consigné en justice*, the said sum. The Court doth condemn the said defendant to pay the said plaintiff the said sum of £9 19 11 with interest &c., &c., and costs, and doth condemn the said plaintiff to pay all costs accrued

in this cause from and after the date of the filing of the said plea, and the said deposit."

The following is the judgment of the 18th June, 1857, rendered upon production of the deed of the 9th May, 1857.—"The Court after hearing the parties, on the motion of the defendant, inasmuch as it appears, by the deed executed on the 9th May, 1857, before Martin and Colleague, and produced with the said motion, that the parties in the said cause, *ont pris arrangement*, and that the plaintiff had undertaken to withdraw his suit, grants *acte* to the defendant of the production of the said deed, and in consequence *met les parties hors de cours sans frais*."

In appeal, it was urged on behalf of the appellant :

That inasmuch as all privileges were matter of exception to the common rule of law, the *onus* of proving the right of *retention* or lien contended for by the sheriff, fell upon the respondent ; that as to the costs of sale of the goods the appellant would not have brought the case into appeal ; but that that part of the judgment giving the sheriff a lien for the costs of the proceedings under the writ of *re-vendication*, could not be maintained.

On behalf of the respondent it was submitted :—

10. That the sheriff, as the public officer performing a duty imposed by law, has a lien upon the property seized for his fees and disbursements.

20. That the sheriff's right of lien extends to the property under seizure, even where *main levée* thereof has been ordered.

30. That the remedy to the defendant is an action of damages against the plaintiff for the illegal seizure, and a part of those damages would be the amount paid to the sheriff before the property was released.

40. That in the event of the property under seizure having been lost, the sheriff would be liable and obliged to indemnify the defendant, directly or indirectly.

50. That in this case the sheriff performed certain duties, such as selling and levying, which would entitle him to retain the fees and disbursements.

60. That the compromise between the plaintiff and Desjardins was a sale of the property under seizure to the present plaintiff for a valuable consideration, and could not be made so as to disturb the rights of the sheriff.

MONDELET, Justice, dissenting.—After stating the pleadings said, in effect, that the questions which presented themselves for decision were two :

1st. Has the sheriff as a public officer a lien upon the property seized for his costs and disbursements ?

2nd. Does such lien or privilege attach to the property seized, even after *main-levée* of the seizure has been granted ? Admitting the affirmative on the first point, and that in certain cases, and so long as the effects seized are in the hands of justice, the second question as it presents itself in this case, cannot be affected, inasmuch as there was in effect *main-levée* granted in favor of the defendant below, the now appellant, who thereby not only takes back his property, but has in his favor an acknowledgment that it ought not to have been seized. So that the second question must be answered in favor of the appellant.

He thought the sheriff could not invoke the arrangement between the parties of the 9th May, 1857. He was no party to it, and no right or advantage could result to him from it. The mutual discharges given by the parties to that arrangement, and the declarations made as to costs concerned themselves only, and not the sheriff; and this might be the reason why the counsel of the parties did not allude to it, considering it, probably, as having no bearing on the case.

If apart from the considerations of law, which, in the view of the learned judge, justified the opinion that the effect of *main-levée* was in favor of the *saisi*, considerations of

equity or arguments *ab inconvenienti* were invoked, it would be seen, that amongst other results from maintaining an opposite principle, it would follow that it would be sufficient to revendicate the effects of any person whomsoever, and that the seizure were irregular and null, to give the sheriff a right to retain the effects, or the monies arising from the sale of a part of them. So that the more a defendant was harrassed by bad proceedings, the more would the sheriff gain, and the more interest would he, or his deputies, have in making such seizures, for the oftener they were made, the more would the defendant have to pay, by the retention of the effects seized, or by the exercise of the privilege sought to be enforced by the sheriff on the monies arising from a sale which, in this case, was not the act of the defendant, but of the Court at the instance of the plaintiff.

He was of opinion, therefore, that the judgment ought to be reversed, and judgment rendered in favor of the appellant.

DUVAL, Justice.—Could not agree in the judgment about to be rendered. He held the sheriff liable to the defendant in the case now submitted for decision. The authorities quoted from Pothier, Depot, No. 92, and 11 Dalloz, p. 660, were against the sheriff instead of being in his favor.

A question might be raised as to whether the form of recourse should not have been by rule on the sheriff, instead of the more expensive recourse by action; but in his opinion the arrangement or transaction between the plaintiff and the defendant in the Court below in the original case, could not be held as a waiver of recourse against the sheriff, or as an *acquiescement* in the proceedings adopted by the seizing party. He held that the *transaction* showed that Desjardins had backed out of his seizure, and agreed to pay his own costs. The defendant Dubois had nothing to do with this; he did not employ the sheriff to make the seizure, nor did he agree to pay Desjardins for persecuting

him. The agreement did not take the case out of the general rule that if the plaintiff loses his action of revendication, the defendant has a right to get his property back.

As to the hardship of the case urged on behalf of the sheriff, he could not see any hardship in it. He had the right to apply to the Court and get an order on the plaintiff for costs of guardinship, and, if not paid, to have the seizure discharged. If instead of doing this, he trusted to the plaintiff, the hardship would be greater in obliging a defendant to pay the costs of a seizure made against his will, and which the seizing party had abandoned.

MEREDITH, Justice.—I concur with the learned Chief-Justice in thinking that the judgment of the Court below ought to be confirmed.

In the present case, after the writ of *saisie revendication* had been duly executed, after a considerable portion of the goods seized had been sold, and after the greater part of the proceeds of the sale had been paid away, in obedience to an order of the Court, the parties made a settlement, which does not impugn, or question, in any way, the legality of the sale of the goods already mentioned.

On the contrary, the settlement appears to me to be in effect, a tacit admission of the legality of that sale; and if that sale was legal, then the sheriff according to my view, was entitled to deduct from the proceeds of the sale, all his fees and disbursements, as well of the seizure, which was a preliminary step to the sale, as of the sale itself. In a word I regard the deed of compromise as being virtually an acquiescence on the part of the present appellant, in the previous proceedings on the part of the respondent, as sheriff; who therefore has a privilege on the proceeds of the sale of the effects, for the amount of his fees and disbursements.

As to the amount of those fees and disbursements, I think the certificate or statement of the public officer is to be presumed correct, at least until it be specially impugned.

I do not lose sight of the stipulation in the deed of *com-promise*, that the plaintiff, in the former case, Desjardins, was to pay his own costs; but that stipulation cannot be understood as extending to fees and disbursements liquidated by a sale previously made, and which sale was, as already mentioned, in effect confirmed by the *acte d'arrangement*.

Considering, as we must, the sale so made as valid, the balance really in the hands of the sheriff was the difference between the gross proceeds of the sale, and the amount he had paid away in obedience to the order of the Court, together with his own fees and disbursements.

Those fees and disbursements were in effect liquidated by the monies which came into the hands of the sheriff, upon the occasion of the sale, and therefore cannot be deemed to have been contemplated as part of the costs undertaken to be paid by the plaintiff in the former case.

SIR L. H. LaFontaine, Bart., Juge-en-Chef.—En 1856, bref de saisie revendication, à la poursuite de F. X. Desjardins, ordonnant au shérif (l'intimé) de saisir des marchandises etc., qui étaient alors en la possession de l'appelant. La saisie fut faite par le shérif. Avant le jour du rapport en cour du bref de saisie, il fut ordonné au shérif par le juge, sur la requête de Desjardins, de procéder à la vente des effets ainsi saisis; la vente produisit £208 18 5, sur laquelle somme il fut payé à une partie intervenante, par ordre de la Cour, celle de £116 15 10, ce qui laissa entre les mains du shérif £84 2 7.

Le 18 juin, 1857, les parties dans l'instance sur la saisie revendication furent mises hors de Cour, ayant pris des arrangements, est-il dit dans le jugement.

L'appelant demandait en conséquence par son action que le défendeur (le shérif) fut condamné à lui payer la dite somme de £84 2 7, avec intérêt du 18 juin, 1857.

Les frais du shérif, tant sur la saisie que sur la vente, se sont montés selon son rapport, à £81 3 1, savoir £67 18 11 sur la saisie, et £13 4 2, frais de la vente.

Le shérif, après avoir relaté les faits, dit qu'il n'a plus entre les mains que £9 19 11, qu'il offre et dépose au greffe.

L'acte d'arrangement, intervenu entre Desjardins et Dubois, et par suite duquel ils furent mis hors de Cour, est du 9 mai, 1857, et a été produit par le shérif. Il contient la clause suivante, dont, chose assez étrange, les parties ne nous ont pas dit un mot à l'audience : " Et aux charges
 " et conditions ci-dessus et des autres parts exprimées, les
 " dites parties se donnent réciproquement quittance finale
 " de toutes demandes, réclamations et prétentions pour
 " dommages, ou à quelq'autres titres que ce soit, que cha-
 " cune d'elles peut avoir, demander et prétendre l'une contre
 " l'autre, au regard des dites poursuites, saisie-arêts,
 " saisies-revendication ci-haut mentionnées, et pour quel-
 " qu'autres causes et raisons que ce puisse être, s'en désis-
 " tant à toutes fins que de droit."

La saisie, la vente, le rapport du shérif, lequel rapport contient en la manière suivie jusqu'ici, un état de ses frais, tout cela a eu lieu avant l'acte d'arrangement intervenu entre les parties. Dans le fait, le shérif rend compte, par son rapport, de la somme qu'il a prélevée, cependant on lui demande par l'action de rendre compte, et puis, sans lui donner crédit pour aucune partie de ses frais, pas même pour ceux que la vente a entraînés, on conclut contre lui au paiement de la susdite somme de £84 2 7.

Je ne crois pas que ce soit là la demande qui aurait dû être formulée. Le shérif, en faisant la saisie et la vente, n'a fait que se conformer aux ordres de la Cour. Si son état de frais est trop élevé, ou erroné, il me semble que Dubois aurait dû l'attaquer spécialement, et démontrer en quoi cet état était ainsi trop élevé ou erroné, ou forcer le shérif à justifier cet état. Il n'en a rien fait. Si, comme le prétend Dubois, il a droit de répéter du shérif ce qu'il peut rester entre ses mains de la somme prélevée, sans lui tenir aucun compte de ses frais, le shérif devrait avoir son

recours contre Desjardins. Cependant, par l'acte d'arrangement, Dubois a libéré Desjardins des conséquences de la saisie, et par conséquent des frais que cette saisie avait occasionnés. Desjardins ne pourrait-il pas opposer avec succès cette libération à une action récursoire de la part du shérif? Dubois ne s'est-il pas, par cela même, chargé des frais du shérif, en supposant que, précédemment à l'acte d'arrangement il n'en pût être tenu?

AYLWIN, Justice.—Stated in effect that the case had been argued on the abstract principle of whether the sheriff had a lien for his costs on all the property seized. This question did not present itself here. There was here, in effect, a writ of execution and sale of property. Part of the proceeds went to pay a privileged creditor of the defendant; the goods were treated as the defendant's goods, his debt was paid by the sale of the goods made for his benefit, and the sheriff makes his return in the usual way, which return is not contested. After this a distribution was made by order of the Court, the sheriff pays over the monies distributed, and the balance, after deducting the fees and costs, he offers to the appellant. In this the sheriff was right. As to the abstract question of lien, it is raised in a case now pending in this Court, but is not to be considered as decided in this case by the judgment of the majority of the Court.

Judgment confirmed.

LAFREYNE and PAPIN, for appellant.

STUART, for respondent.

BEFORE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—LORD KINGSDOWN, SIR EDWARD RYAN, and THE MASTER OF THE ROLLS.

THE BANK OF MONTREAL..... *Appellants.*
and

SIMSON, *et vir.*..... *Respondents.*

Held :—10. That the power of a tutor, without the sanction of a Court of Justice having been previously obtained, does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character; and further that his power is also restricted from selling any portion of the moveable property of the ward without the intervention and previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily cease to exist, or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which an hereditary *pretium affectionis* is attached; and that shares in a bank, or bank stocks fall within the description of *moveable property* which the tutor cannot dispose of without authority.

20. That the sale of shares in a Bank by a tutor, must be treated not as a voidable transaction but as actually void, and that, therefore, the persons who bought the shares need not be included in any action brought in relation to such shares.

Jugé :—10. Que sans autorisation en Justice préalablement obtenue, les droits d'un tuteur ne s'étendent pas à vendre les propriétés immobilières de son pupille, ou aucune partie de ces propriétés qui a le caractère d'immeubles; et de plus que ses pouvoirs ne s'étendent pas à vendre aucune partie des propriétés mobilières de son pupille sans l'intervention et la sanction d'une cour de justice préalablement obtenue, excepté ces portions qui ne produisent aucun revenu, et aussi les effets qui étant d'une nature périssable cesseront nécessairement d'exister, ou qui, pour des causes permanentes, auront perdu de leur valeur à l'époque où le pupille atteindra son âge de majorité; et ce pouvoir restreint de disposer des propriétés qui ne produisent aucun revenu, est encore limité par une restriction quant à la disposition d'effets qui ont le caractère de meubles de famille, *heir-looms*, et auxquels l'on attribue un prix d'affection héréditaire; et que des actions ou parts de banque tombent dans la catégorie de propriété mobilière dont le tuteur ne peut disposer sans autorité.

20. Que la vente par un tuteur d'actions ou parts de banque, ne doit pas être considérée comme une transaction annulable mais comme absolument nulle, et que, par conséquent, il n'est pas nécessaire que les personnes qui ont acheté ces parts soient mises en cause dans aucune action touchant telles parts.

Judgment delivered the 2nd. August, 1861.

The appeal in this case involves a question of considerable importance as to the extent of the authority of a tutor over the property of his ward according to the law of Lower Canada, which is the old French law. The respondent, Dame Eleonore Simson, is the only child and sole heiress of her father, John Simson, who died in March, 1835; she was a posthumous child, born in the month of August, after the death of her father. On the 9th October, 1835, her

mother was appointed her tutrix, and a gentleman of the name of John Fisher was appointed sub-tutor. On the 19th July, 1843, the mother of the respondent married Charles Michel Delisle, and they were, in October following, appointed joint tutor and tutrix of the respondent. In November following the mother of the respondent died, whereupon, in December, 1844, the maternal grand-mother was appointed tutrix. On the death of the grand-mother, which took place in May, 1846, Robert Simson, an uncle, was appointed sub-tutor, and Charles Michel Delisle, the step-father, was appointed tutor of the respondent. This appointment was made on the 27th May, 1846, and in such a manner as not to interfere with or abrogate the appointment previously made of Robert Simson as sub-tutor.

Part of the property of the infant, derived from her father, consisted of thirty shares in the Bank of Montreal. Robert Simson, on the 29th September, 1846, in his character of sub-tutor, gave a notice in writing to the Bank, through its cashier, informing them that C. Michel Delisle had no power or authority to sell these shares. Notwithstanding this notification, C. Michel Delisle sold six of the shares in December, 1848; two more in January, 1849; ten more in June following; and the remaining twelve in the following month of September, 1849. In all these cases the Bank of Montreal made the transfer of these shares in the books of the Bank, as required by Delisle, out of the name of the father of the respondent, in whose name they were standing, into the name of the various purchasers to whom Delisle had sold them. The question in this appeal is the validity of these transfers.

The respondent, in 1855, married her present husband, Mr. Turner, who is also a respondent. In September, 1857, about a year after she attained her majority, and being by her marriage contract solely entitled to the property derived from her father, she instituted original proceedings against the Bank of Montreal in the Superior Court of Lower Canada, claiming the dividends which had accrued due on the

thirty shares from the time of their sale in December, 1848, and in January, June and September, 1849. The sole question in the cause was whether the transfer of the shares was valid and effectual. The case was fully argued before the Superior Court of Montreal on the 30th of November, 1859, when the Court pronounced a judgment in favor of the respondent, holding that the power of the tutor did not extend to the sale of the shares, and that the transfer of them by the tutor was null and void.

The Bank of Montreal appealed from this judgment in 1860, to the Court of Queen's Bench in Canada, and the case was argued in March, 1860, and judgment given on the 31st May, 1860, by a majority of the judges affirming the decision of the Court below, and dismissing the appeal with costs. The correctness of this decision is the question before us.

The facts are not in dispute, and the question to be determined is the extent of the authority of a tutor over the property of his ward; whether that authority extended to selling the Bank shares in question; and if it did not so extend, whether the act can be considered as void in itself or only voidable. For the purpose of determining this question it is necessary to ascertain what the law of France was in this respect prior to the great French Revolution, which is the law which now obtains in Lower Canada. This law is the old Civil Law as applicable to this subject, regulated nevertheless by article 102 of the Ordonnance of Orleans, promulgated in January, 1560, during the reign of Charles IX., and which modified to some extent in this respect the Civil Law which had previously prevailed on this subject.

The general power of the tutor over the ward and his property was that of a parent—" *Domini loco habetur* " he could get in the property of the minor and give a discharge for payment of debts due to him; in all matters relating to the tutelage the act of the tutor bound the minor. The power of the tutor to dispose of the property of the minor

was originally by the Civil Law unlimited, unless accompanied by fraud; and in some cases he was compulsorily required to realize by sale all property that might by possibility suffer by being kept, such as houses, lest they should be burnt.

This general power was limited first by the law of Alexander Severus, which forbade the sale of "*prædia*" belonging to the ward, and afterwards by the Edict of Constantine, which prohibited the sale not merely of "*prædia*" without judicial authority, but even the sale of any other property of the minor, unless such as was liable to perish by use, and also the superfluous animals. And this was the law obtaining in France in the earlier part of the sixteenth century, when it was further regulated by the Ordonnance of Orleans in January, 1560, by which, in article 102, it is enacted that tutors and curators shall be bound, as soon as they have made an inventory of the property of their wards, to sell, "*par autorité de justice*," the perishable moveables, and to lay out the produce, under the advice of relations and friends, in the purchase of "*rentes ou héritages*," that is, in the purchase of property producing a permanent income. It is to be observed, therefore, that the Ordonnance of Orleans recognizes the law then subsisting in France in this matter to be regulated by the Edict of Constantine, which prohibits the sale of any property of the minor except those moveables which perish by use, and the superfluous animals; and then in order to extend the power of sale of the tutor, not merely over such moveables as are within the class specified by the Edict of Constantine, but also over those which are liable to decay or risk from other causes, enacts that the tutor shall have power to sell all "*meubles périssables*" but these only under the authority of the law, "*par autorité de justice*."

By "*meubles périssables*," as distinguished from moveables which perish by use, we understand to be meant all property which is liable to deteriorate from permanent causes. It is obvious that an Ordonnance which declares that for the sale of perishable property of a moveable character the

sanction of a Court of Justice shall be required, infers that moveable property which is of a permanent character, and producing a permanent income, cannot be disposed of without such authority.

The effect and extent of the Ordonnance of Orleans on the power of a tutor over the property of his ward has been the subject of much discussion by the writers and jurists versed in French law, and has also been the subject of many judicial decisions, several of which have been cited and commented upon in their works.—After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcilable diversity of opinion appears to exist between them, and that the result of the law so far as it is applicable to the case before us may be thus stated : —

The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it ; but without the sanction of a Court of Justice having been previously obtained, his power does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character ; and further that his power is also restricted from selling any portion of the moveable property of the ward without the intervention and previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily either cease to exist, or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority ; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which

an hereditary "*pretium affectionis*" is attached. Although this is an incomplete statement of the law, it is, we think, accurate, and sufficiently comprehensive for the purposes of this case.

It has been contended on behalf of the appellants, that as in the civil law, the original principle was that the tutor stood in the place of the father, and was *dominus* of the property of the ward, and as such had power to dispose of all his property, the case must be considered as one in which the burthen of proof lies on the respondent to establish that the property in question falls within the range of the various classes of property which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control ; these exceptions, it is said, were of three sorts ; first, immoveable property ; and next, *quasi* immoveable property, which was called "*immeubles fictifs* ;" and thirdly, moveable property of a peculiar value as possessing a "*pretium affectionis*," and being in the nature of heir-looms ; that these were the only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank-shares do not fall within the description of any one of these classes of property, and consequently that the power of the tutor over them was absolute, and the right of the respondent to recover them gone.

But this is not the view we take of this case ; we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that if the matter had remained as fixed by that Edict, such must be considered to have been the law of France prior to the year 1560. And we also think that the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified,

and this only with the previously obtained sanction of a Court of Justice.

Although the various authorities cited to us are susceptible of various meanings, and without some qualification of the generality of their terms are not entirely reconcileable, yet this is, we think, the general effect of them ; and this view is confirmed by the cases cited and commented upon in such authorities ; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the state, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of "*immeuble fictif*."

But the case proceeds to say :—" Il en serait de même s'il s'agissait d'une chose purement mobilière, mais d'une grande valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession."

If this be the correct view of the case, the burden of the proof falls on the appellants to show that the bank shares fell within the property which Delisle as tutor was entitled to dispose of without the sanction of a Court of Justice.

It is always to be borne in mind that, as the wants and exigencies of society increase, new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply ; but we entertain no doubt, upon a full review of this subject, that the Bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a Court of Justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to rise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned, between

the shares in the Montreal Bank and shares in the company of the Bank of England, and stock in the English or foreign funds, and that the sale and realization of such property requires the interposition and sanction of a Court of Justice, and the re-investment of the proceeds in property producing a permanent income, according to the terms of the Ordinance of Orleans.

It has also been argued before us that the power of the tutor is, by all the authorities, held to include administration, and that administration necessarily includes sale. But we dissent from that argument; we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which in its technical sense applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out.

It is partly for this reason that we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case.

Neither have we thought it of any moment to consider the articles in the present French Code, or the discussions in the Conference which took place when the Code was framed, except so far as these conferences illustrate any ambiguous point in the earlier law which up to that time obtained in the Kingdom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in the province of Lower Canada, it was not in the power

of the tutor to sell the Bank shares without the assistance and sanction of a Court of Justice.

The next question to be considered is the effect of the sale which has actually taken place, and the transfer of these shares to persons who are strangers to the record.

It is argued by the counsel for the appellants, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that, being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the Court to answer to a matter in which they were so materially interested.

We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority, is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refer to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his "*Traité des Personnes*," Part I, Tit. 6, article III, section 2.

After stating in this passage that a minor can, after his minority is over, reclaim immoveable property sold by the tutor, Pothier observes that he can do so without having "besoin pour cela de lettres de rescision; car on n'a besoin de ces lettres que pour revenir contre son propre fait. Un mineur a besoin de lettres contre le fait de son tuteur, parce que le fait de son tuteur est censé son propre fait: mais cette règle n'a lieu qu'à l'égard des choses renfermées dans le pouvoir d'un tuteur, c'est-à-dire qui concernent l'administration du tuteur. Or, cette vente faite par le tuteur, étant une chose qui excède les bornes du pouvoir

du tuteur, n'est pas plus à cet égard le fait du mineur que ne le serait le fait d'un étranger qui se serait avisé de vendre cet immeuble. Le mineur n'a donc pas plus besoin de lettres pour revendiquer cet immeuble, que s'il avait été vendu par un étranger sans caractère ; et le tuteur lui-même dans les choses qui excèdent son pouvoir, doit être regardé sans caractère."

This passage, besides bearing on the point now considering, is useful as also pointing out that in the sense in which the word " administration " was employed by the French jurists on this subject it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immoveable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a Court of Justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is, in fact, the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the Bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them.

Though it cannot, in our opinion, affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor, Robert Simson, on the 29th of September, 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the bank that Delisle, the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of Delisle seem also to have been notorious, and likely to be

known to the Bank, in which case it was probable that any sale by him would be for his own sole advantage.

The functions and duties of the sub-tutor seem to be not very clearly defined ; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavour to prevent injury being inflicted on the person or property of the ward. Nothing could be more formal or precise than the notice served by him on the Bank in that character ; and as the Bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queen's Bench, is correct, and must be affirmed, with costs ; and they will humbly advise Her Majesty accordingly.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 1246. { LaFontaine Demandeur.
vs.
{ Suzor, et al Défendeurs.

Jugé :—1o. Que, dans l'espèce, l'usufruitier ne peut répéter du propriétaire que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles sujets à l'usufruit.

2o. L'usufruitier peut réclamer les impenses utiles que jusqu'à concurrence de ce que les immeubles s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution.

3o. Les impenses grosses et nécessaires sont remboursables en entier, quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que l'usufruitier ne soit pas coupable de leur disparition par suite de son manque d'entretien.

4o Les impenses voluptuaires ne sont pas remboursables.

Held :—1o. That, in the case submitted, the usufructuary can only recover from the proprietor the costs of the large repairs and of the repairs necessary for the preservation and enjoyment of the immoveables subject to the usufruct.

2o. The usufructuary can only claim the value of useful improvements in so far as the immoveables derive value from them at the time of the opening of the substitution.

3o. The large repairs and necessary improvements are payable in the entire, even though they should have ceased to exist at the opening of the substitution, provided they have not so ceased to exist by the fault of the usufructuary, and by reason of his want of care.

4o. That ornamental repairs are not payable by the proprietor.

Jugement rendu le 4^{me} jour de Septembre, 1861.

Le demandeur, tant en son propre et privé nom, comme ayant été commun en biens avec feu dame Adèle Berthelot son épouse, que comme son légataire universel et son exécuteur testamentaire, réclame des défendeurs, tuteurs conjoints des enfants mineurs issus du mariage de feu Amable Berthelot (que je désignerai sous le nom de, le fils, pour le distinguer de son père portant le même nom) et de dame Marie Joséphine Zoé Desrochers, les dits enfants comme seuls légataires universels de feu Amable Berthelot, père, leur ayeul, une somme de £570 16 6, pour valeur de certaines réparations faites par le demandeur et son épouse à deux maisons dont l'usufruit de l'une fut donné par feu Amable Berthelot père, à la dite dame LaFontaine lors de son mariage avec le demandeur, en juillet, 1851, et l'autre léguée à la même dame par le même Amable Berthelot père, par son testament en date du 20 novembre, 1844, à la condition expresse, exprimée dans le contrat de

mariage, que la propriété de ces deux maisons appartenait aux enfants de la dite dame en légitime mariage, et en cas de son décès sans enfants, la propriété retournerait au dit Amable Berthelot père, et s'il était décédé au moment de la mort de madame LaFontaine, la propriété retomberait dans sa succession ou suivrait ses dispositions testamentaires, et à la condition, exprimée au testament, que la propriété de l'autre maison appartiendrait aux enfants de madame LaFontaine, à naître de son mariage avec le demandeur, et dans le cas que madame LaFontaine mourrait sans enfants, alors la propriété de la maison en dernier lieu mentionnée, irait à Amable Berthelot, le jeune, son fils, en usufruit seulement, et la propriété à ses enfants. Les enfants du dit Amable Berthelot le fils, sont admis être actuellement propriétaires des deux maisons, par suite de ce que madame LaFontaine est décédée en mai, 1859, sans enfants. Les défendeurs plaident à la demande :

- 1o. Que les impenses faites par le demandeur et feu son épouse, pendant leur possession des dites maisons, ne sont que de simples réparations ou impenses d'entretien, et à la charge de leur jouissance,
- 2o. Ils ont nié que le demandeur et son épouse aient fait aucune grosse réparation.
- 3o. Que lorsque le demandeur et son épouse ont pris possession de ces maisons, elles étaient en bon état et ne nécessitaient pas de réparations.
- 4o. Que les grosses réparations réclamées par le demandeur, ont été faites par le demandeur, du vivant de feu A. Berthelot père, leur donateur, et pour leur commodité et avantage.
- 5o. Qu'il n'y avait pas de nécessité de reconstruire, en 1839, l'une de ces maisons, que les impenses faites en conséquence par le demandeur et son épouse n'étaient pas nécessaires, mais simplement utiles, et conséquemment non remboursables.
- 6o. Qu'à l'expiration de l'usufruit par la mort de madame LaFontaine, le 27 mai, 1859, les deux maisons furent laissées par le demandeur en un mauvais état, nécessitant de grandes réparations, et que le demandeur ne pouvait répéter contre les défendeurs, la valeur entière de leurs réparations

nécessaires, mais seulement leur valeur au moment de la cessation de l'usufruit.

Il s'élève en cette cause des questions de faits et de droit sur l'étendue du recours du demandeur, sur son droit de réclamer, non-seulement les grosses réparations, mais même les réparations utiles, et la plus ou moindre valeur de ces dernières réparations eu égard à l'époque où les défendeurs sont censés en jouir.

Les principes sur lesquels je dois décider la cause actuelle sont ceux-ci, savoir :

1o. Le demandeur ne peut réclamer en entier que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles. 2o. Il ne peut réclamer des impenses utiles, et qui auraient même augmenté la valeur de la propriété, que jusqu'à concurrence de ce que les maisons s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution. 3o. Les impenses grosses et nécessaires doivent être remboursées en entier quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que le demandeur ne soit pas coupable de leur disparition par défaut d'entretien. 4o. Les impenses voluptuaires ne doivent pas être remboursées.

L'enquête faite en cette cause démontre qu'une de ces maisons, qui est celle connue sous le nom de la maison de madame Todd, et bâtie sur l'immeuble désigné en premier lieu en la déclaration en cette cause, fut donnée en usufruit à madame LaFontaine en son contrat de mariage avec le demandeur, comme on l'a déjà vu, que cette maison à cette époque était une très-ancienne maison, qui avait déjà été incendiée, réparée à faux frais sans en reconstruire les murs, et habitée telle que telle jusqu'en 1839, époque à laquelle son état de délabrement était devenu tel qu'il était impossible de l'habiter, et qu'il était devenu nécessaire de la reconstruire presque en entier, aussi voit-on que par un marché en date du 29 octobre, 1839, entre H. S. Huot écr.,

comme procureur du demandeur, et Isaac Dorion et M. L. Petitclerc, il fut convenu que ces deux personnes seraient à cette maison des travaux équivalents à une reconstruction, à l'exception des murs et de la couverture qui, cependant, fut refaite à neuf, lorsqu'après l'avoir visité on se fut aperçu qu'elle ne valait rien. Le coût de ces premières réparations fut stipulé être de £200 pour la menuiserie, et en ajoutant les ouvrages additionnels et jugés nécessaires pour la réparation de cette maison, le tout se monta à £253 18 9 courant, pour coût des premières réparations faites à la dite maison No. 1 par le menuisier Isaac Dorion, je considère ces réparations nécessaires ou grosses réparations du caractère de celles dont le propriétaire doit tenir compte à l'usufruitier. Je suis donc d'opinion que, quant à cette somme, elle doit être répétée par le demandeur des défendeurs es qualités. Il y a aussi les réparations de maçonnerie qui ont le même caractère de réparations indispensables, et doivent être allouées au demandeur, 1o. au montant de £75, premier prix du marché susdit, 2o. au montant de £53 10 9, pour ouvrages additionnels (extras) faits à la dite maison No. 1 lors de sa reconstruction comme susdit; sur le montant du compte du demandeur pour ces extras, j'ai retranché plusieurs items non prouvés, et l'item de £15 pour un poêle qui doit être considéré, ou comme meuble, ou comme impense voluptuaire. Il doit aussi être accordé au demandeur, une autre somme de £91 5 6½, que le demandeur a prouvée à ma satisfaction avoir dépensée sur les maisons en question, par des ouvrages faits depuis la reconstruction de la maison, qui, sans être nécessaires, sont d'une grande utilité, et resteront aux propriétaires, et aussi pour l'introduction de l'eau et du gaz dans ces maisons, pour la construction des canaux, pour la valeur de grilles. Il n'est pas prouvé que ces derniers ouvrages soient en ce moment détériorés pour m'autoriser à les réduire à leur valeur actuelle comme étant celle à laquelle les défendeurs sont tenus d'indemniser le demandeur, d'après le principe que j'ai énoncé plus haut. Cependant, comme ces ouvrages doivent avoir subi, depuis les quelques

années qu'ils sont faits, une diminution de valeur, j'ai pris sur moi de déterminer cette diminution que j'établis à 20 par 100, et cela dans le but d'éviter aux parties le trouble et les dépenses d'une expertise. Néanmoins on verra par mon jugement que je laisse aux parties le choix de demander à cet égard une expertise, qui pourrait peut-être être plus favorable à l'une ou l'autre. Les items formant cette somme de £91 5 6½, sur lesquels j'ai ainsi fait la déduction sont,

1o.	£10	18	4,	payé à Andrews pour eau.
2o.	1	10	7,	" à Joseph Gingras.
3o.	5	17	0,	" à Antoine Moisan.
4o.	40	10	0,	" à M. Marrier.
5o.	5	11	5,	" à M. Bell.
6o.	13	17	4,	" à Andrews pour gaz.
7o.	1	15	8,	" à Joseph Gingras.
8o.	11	5	2½,	" à M. Shaw.

£91 5 6½

5 10 0

couverture allouée.

£96 15 6½

Le demandeur doit aussi être remboursé en outre de £5 10 pour coût de la confection entière d'une couverture.

Cette déduction de 20 par 100 réduit donc à £78 10 2½ la valeur que je crois pouvoir accorder au demandeur sur les impenses faites à la propriété de ces maisons depuis la reconstruction de l'une d'elles en 1839. J'ai rejeté comme non recouvrable des défendeurs les items de réparations utiles, il est vrai, mais que je considère être des réparations de simple entretien, et à la charge de l'usufruitier, savoir: £8 1 0 payé aux nommés Vézina et Gaboury pour réparations à un hangard et autres choses de la maison No. 1 en 1850; de £9 11 11 payé au nommé Ls. Darveau pour réparation en 1850, à la maison No. 2; £2 19 4 à Ignace Dorval pour réparations en 1855, ces derniers ouvrages faits à la maison No. 2; £8 0 0 au

nommé Gouge pour réparer la couverture de la maison en 1855 ; £7 10 0 au nommé Alaire pour avoir peint une partie de maison en 1857 ; £6 3 11 au nommé Poitras pour ouvrages faits comme réparations à la maison en 1856 ; £5 7 8½ payés au nommé Gaboury pour réparation à une couverture en 1857. J'ai retranché des £30 payés à M. Shaw, tous les items excepté le coût de la grille et du gaz, les considérant comme réparations d'entretien, tandis que la grille et le gaz sont des ouvrages permanents, et qui serviront aux propriétaires.

Le total formé des divers montants susdits s'élève à la somme de £460 19 1, pour laquelle il y a jugement contre les défendeurs, ès qualités, et les reprenants l'instance, avec intérêt de l'assignation, et les dépens.

FOURNIER et GLEASON, pour le demandeur.

LÉGARÉ et MALOUIN, pour les défendeurs.

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 862. { ALLEYN..... Demandeur.
 vs.
 LA COMPAGNIE D'ASSURANCE DE
 QUÉBEC..... Défenderesse.

Jugé :—1o. Que le propriétaire d'une maison incendiée, et assurée, peut insister strictement sur la clause contenue en la Police d'assurance, que les ouvrages seront vus et visités par experts, et que tant que la Compagnie d'Assurance ne se sera pas conformée à cette condition, même pour des ouvrages peu considérables, le propriétaire n'est pas tenu de recevoir sa maison en cet état, et peut poursuivre la Compagnie d'Assurance pour l'obliger à lui rendre la possession d'icelle en l'état ou elle doit être, et après l'observation de la condition d'une expertise.

2o. Que le fait que le propriétaire pendant la reconstruction aurait fait à l'ouvrier des suggestions sur la manière de reconstruire, ou sur la division des appartements, ne peut être interprété contre lui comme une renonciation à son droit d'une expertise.

Held :—That the proprietor of a house destroyed by fire, and insured, can insist strictly upon the clause contained in the policy of insurance, that the works shall be seen and examined by experts, and that so long as the insurance company shall not have complied with this condition, even for inconsiderable works, the proprietor is not bound to receive his house in that state, and can sue the insurance company to compel it to surrender the possession of the premises in the state in which they ought to be, and after compliance with the condition of an *expertise*.

2o. That the circumstance of the proprietor having during reconstruction made suggestions to the builder as to the manner of such reconstruction, or as to the division of the house, cannot be interpreted so as to deprive him of his right to an *expertise*.

Jugement rendu le 4me jour de septembre, 1861.

Le demandeur, par sa déclaration, se plaint que les défendeurs refusent de lui rendre la possession de sa maison et dépendances, situées rue Haldimand, en la cité de Québec, qui ont été assurées au bureau des défendeurs pour £900, en 1859; et incendiées en février, 1860. Il allègue en sa déclaration que les défendeurs faisant usage du privilège que leur accordait la police d'assurance, ont jugé à propos de rebâtir la maison au lieu de payer le montant de l'assurance. Que les défendeurs ont de fait rebâti la maison et dépendances, mais ne se sont pas acquittés de la chose de manière à satisfaire le demandeur, et aussi de rebâtir d'une manière convenable et en bon ouvrier, et à dire d'experts, en toute diligence, ont manqué à ces conditions, nonobstant que dès le 25 octobre, 1860, ils aient de

fait terminé l'ouvrage et aient notifié le demandeur que les ouvrages étaient complétés, et l'aient sommé d'accepter sa maison et de les décharger de tout recours en raison des ouvrages. Le demandeur se plaint de plus que les défendeurs veulent l'obliger à accepter ces ouvrages sans qu'ils aient été vus et visités par des experts, conformément à une des conditions de la police d'assurance, et que de cette manière le demandeur ne peut accepter sa maison, et qu'il réclame des dommages au montant de £400, résultant de ce qu'il ne peut louer la maison, ne peut l'assurer contre le feu, etc., etc. Et il conclut à ce que, sous tel délai, la cour ordonne que les défendeurs soient condamnés à lui rendre et restituer la possession de la dite maison et dépendances, et de plus, que les défendeurs soient condamnés à lui payer les £400 de dommages ci-dessus mentionnés, avec intérêt et dépens.

Les défendeurs ont plaidé à cette demande qu'ils avaient fait rebâtir cette maison et ses dépendances par le nommé Louis Amiot, ouvrier, en vertu d'un marché cité en leur plaidoirie, que le dit Louis Amiot s'était bien acquitté de son devoir, et de manière à donner pleine et entière satisfaction au demandeur, qui avait lui-même, en compagnie de membres de sa famille, vu et visité les ouvrages, les avait approuvés et avait fait des suggestions auxquelles l'ouvrier s'était conformé, que plusieurs ouvrages additionnels avaient été faits à la bâtisse, lesquels, les défendeurs n'étaient pas tenus de faire, et que la reconstruction de la maison donnait à la propriété du demandeur une valeur de £200 au-delà de celle qu'elle avait avant sa destruction par le feu. Que les défendeurs ayant notifié le demandeur par protêt du 25 octobre, 1860, que les ouvrages étaient complétés, et le demandeur leur ayant signifié son intention de faire examiner les ouvrages par des experts, cette visite eût lieu vers le 6 novembre, et que l'ouvrage fut trouvé recevable, que néanmoins le demandeur donna une liste des ouvrages à faire ou à compléter, que ces ouvrages furent

faits et complétés, et que la clef de la bâtisse avait été offerte au demandeur vers le 16 novembre, 1860, et que le demandeur l'avait refusée. De plus il fut plaidé par les défendeurs que le demandeur était en possession de la maison par ses locataires. Le demandeur a répondu spécialement à ce plaidoyer des défendeurs, mais comme la majeure partie de cette réplique est une argumentation en droit, je me contenterai de rapporter les matières de faits qu'elle contient. Les points principaux de cette réplique, sont que les changements qui ont eu lieu dans la bâtisse ont été faits du consentement de l'ouvrier, et comme l'équivalent d'autres ouvrages qu'il devait faire, mais qu'ils n'obligeaient pas l'ouvrier à de plus grands frais ; qu'en réalité, lui, le demandeur, avait, lors de la visite du 6 octobre, 1860, donné une liste des ouvrages qu'il désirait voir exécuter, mais que cette liste ne fût donné qu'avec la réserve en faveur du demandeur contre les défendeurs de son recours pour tout autre défaut qui pourrait se découvrir ci-après, y compris les vieux murs, que les défendeurs ont voulu le forcer à accepter tous les ouvrages sans lui donner occasion de contredire l'ouvrage, de le faire examiner par experts, et l'obliger à les décharger complètement de tout recours de sa part contre eux, à l'égard de l'exécution de l'ouvrage, etc.

L'enquête qui a eu lieu constate tous les faits principaux relatifs à l'assurance de la propriété, à sa destruction par le feu, et à sa reconstruction par les défendeurs. Le point principal de la cause consiste dans la question de savoir si le demandeur en visitant l'ouvrage à mesure qu'il avançait, en faisant des suggestions à l'ouvrier sur la manière de faire les distributions des chambres, et lui faisant faire d'autres ouvrages au lieu de ceux qu'il était tenu de faire, et en donnant la liste des ouvrages qu'il entendait faire faire ou corriger à la suite de l'espèce de visite ou expertise qui eut lieu le 6 octobre, 1860, et lesquels ouvrages sont prouvés avoir été faits, si, dis-je, le défendeur a renoncé à ses droits de faire examiner les derniers ouvrages par des experts conformément à la condition de la police d'assurance, et

s'il pouvait être obligé par les défendeurs à leur donner, en recevant les ouvrages, une décharge de toute réclamation ou demande relativement à la dite police d'assurance, tel que les défendeurs l'exigent par leur protêt du 25 octobre, 1860. Je n'entends pas soulever de question quant au fait de savoir si le demandeur a pris possession de la maison en la louant à M. Wood, qui est prouvé l'avoir occupée depuis la fin de novembre, 1860 ; car il est clairement prouvé que le demandeur n'a pas voulu consentir à ce que M. Wood prit possession de la maison, et que ce M. Wood en est en possession d'une manière, qu'en loi, je puis qualifier de voie de fait.

Il n'y a pas de doute que les conventions des parties doivent être exécutées, et strictement interprétées par les tribunaux, devant lesquels les parties jugent à propos de porter les difficultés qui surgissent entre elles à propos de l'interprétation de leurs conventions. Dans la présente cause les défendeurs ont jugé à propos de rebâtir la maison et dépendances, dont il s'agit, au lieu de payer au demandeur les £900 qu'ils avaient promis lui payer comme l'équivalent de la valeur de sa maison en cas d'incendie. Ils sont censés avoir fidèlement apprécié la valeur de cette maison au montant de £900, puisqu'il ont le soin, jusqu'au dernier moment, de lui faire payer une prime d'assurance sur le pied de £900. Ils avaient droit de rebâtir la maison conformément à une des conditions de la police d'assurance, mais ils étaient strictement tenus de tous les accessoires de cette condition, ils devaient entre autres choses, rebâtir à dire d'experts. On voit que le nommé Louis Amiot a reconstruit la maison pour £670, et le hangard pour £40, et que dès le 6 octobre, 1860, les parties se sont rencontrées avec des experts pour visiter et recevoir les ouvrages. Il y fut fait une espèce de visite dont les détails et les circonstances n'apparaissent pas dans aucun rapport d'experts, mais il appert par le témoignage en la cause, que M. Archer et M. McKay de la part du demandeur, et M. Dorion de la part des défendeurs, agirent

pour les parties, et que dans le cours de la visite, M. Riverin, secrétaire de l'assurance, proposa au demandeur de lui donner une liste des ouvrages auxquels le demandeur trouvait à redire, et de ceux à faire, ce qui fut fait, et là se borna la visite et la prétendue expertise plaidée par les défendeurs. Plus tard les ouvrages spécifiés dans la liste fournie par le demandeur, furent faits, si j'en crois M. Louis Amiot, et je suis disposé à dire qu'ils ont été faits. Le 25 octobre, 1860, les défendeurs notifèrent le demandeur que les ouvrages étaient finis, le sommant de recevoir la clef et de prendre possession de sa maison, à la condition de leur donner une décharge pleine et entière de toute réclamation à l'égard de la police d'assurance, à cette sommation le demandeur a répliqué bien énergiquement qu'il acceptait la clef de la maison se réservant tout recours qu'il pourrait avoir contre les défendeurs, et à la charge d'une visite et examen immédiat par des personnes compétentes et non autrement. On ne voit pas qu'à la suite de cette réponse les défendeurs aient consenti à faire visiter les ouvrages par experts, ou à faire connaître au demandeur qu'ils renoncassent à la demande qu'ils lui faisaient par leur dit protêt, d'une décharge pleine et entière de toute réclamation de sa part à l'égard de la police d'assurance. Au contraire, on voit que le demandeur, par un protêt du 30 octobre, 1860, notifia aux défendeurs son intention de tenir les défendeurs responsables des dommages à raison de leur injuste refus de lui livrer la maison. Il est vrai qu'il y a une certaine contradiction entre les témoins relativement à l'époque à laquelle eut lieu la rencontre de MM. McKay, Archer et Dorion, mais par la date de la liste de M. Alleyn, contenant l'état des ouvrages qu'il désirait faire faire, on voit que c'est le 6 octobre, et non le 6 novembre, que cette visite à eu lieu, d'ailleurs M. Amiot jure positivement que cette visite à eu lieu le 6 octobre. Les défendeurs, suivant moi, n'ont pas le droit de faire accepter les ouvrages par le demandeur à moins qu'ils n'aient été visités et reçus par experts. Inutile de dire qu'ils ont été approuvés par le demandeur pendant leur exécution, cette visite et cette approbation

apparente n'aurait pour effet que de faire voir que le demandeur désirait surveiller la distribution des appartements de sa maison, et désirait exercer le droit qu'il avait de voir que les ouvrages fussent bien faits au meilleur de sa connaissance et pour sa plus grande utilité, mais comme le demandeur n'est pas prouvé être un homme de l'art dans la construction de maisons, je ne puis considérer sa conduite en cette occasion comme une approbation de la qualité et de la suffisance des ouvrages, et comme une renonciation au droit qu'il avait de faire constater par experts la qualité de l'ouvrage. Mais supposons que l'on puisse interpréter le fait de donner une liste des ouvrages à faire comme une approbation de l'efficacité de tous les autres, et comme une renonciation au droit de les faire examiner par experts, il reste toujours la même difficulté pour les ouvrages mentionnés en la liste, qui n'ont jamais été approuvés ni reçus par des experts. La conduite des défendeurs est assez singulière jusque là, mais si l'on ajoute que par leur protêt ils veulent faire renoncer le demandeur à tout recours en dommages à l'égard de cette police, leur conduite et leurs prétentions deviennent absurdes à un haut degré. Les défendeurs sont donc dans le tort, et leur conduite est injustifiable suivant moi, ils sont donc encore en possession de la maison du demandeur, ils l'étaient à l'époque de l'institution de l'action, et sont par conséquent passibles des dommages que le demandeur à souffert.

Ces dommages sont la perte des loyers du demandeur depuis le 15 octobre jusqu'à ce jour, s'élevant à £109 7 6, pour laquelle somme il y aura jugement contre les demandeurs, condamnant de plus les défendeurs à livrer au demandeur la possession de la maison et dépendances en question en cette cause, dans l'état où ils sont tenus de la livrer après visite et examen par experts, et ce sous quinze jours de la signification de la présente sentence; si non, et à défaut par les défendeurs de se conformer à la présente sentence, il sera permis au demandeur de s'en mettre en possession au moyen d'un bref de cette Cour

adressé au shériff de ce district. Réservant au demandeur son recours pour dommages à compter de ce jour, qui peuvent lui résulter du refus des défendeurs de livrer au demandeur la dite maison et dépendances en temps opportun, et dans l'état ou elle doit l'être en conformité à la police d'assurance, le tout avec intérêt et dépens.

ALLEYN, pour le demandeur.

STUART & MURPHY, pour les défendeurs.

**BANC DE LA REINE, } DISTRICT DE QUÉBEC.
EN APPEL.**

**Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chef,
AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.**

**BROWN..... Appelant.
et
GUGY..... Intimé.**

Les parties étaient toutes deux propriétaires riverains de terrains séparés par la rivière Beauport ; en 1850 le demandeur construisit un quai sur sa propriété ; en octobre 1852 le défendeur en fit autant de son côté, sur quoi, dans le même mois d'octobre, le demandeur porta son action réclamant : 1o. des dommages, 2o. démolition du quai construit par le défendeur :

Jugé :—1o. Que si, dans l'espèce, la construction du quai du défendeur était de nature à causer au demandeur des dommages, il n'en avait éprouvé aucun lorsqu'il introduisit son action.

2o. Que la demande en démolition du quai du défendeur ne pouvait être admise qu'en autant qu'il serait établi que ce quai avait été construit, en tout ou en partie, sur le lit de la rivière.

3o. Que tout propriétaire riverain a droit de protéger les rives de son héritage, et de reconquérir par la construction de quais, ou autrement, ce que l'action des eaux lui a enlevé ; pourvu que l'exercice de ce droit n'apporte au cours des eaux aucun changement préjudiciable au voisin.

The parties were respectively riparian proprietors of lands divided by the river Beauport ; in 1850 the plaintiff built a wharf upon his property ; in october 1852 the defendant also built a wharf upon his property, upon which, in the said month of October, the plaintiff brought his action claiming : 1o. damages, 2o. the suppression of the wharf erected by the defendant.

Held :—1o. That if, in the case submitted, the erection of the wharf by the defendant was such as to cause damages to the plaintiff, he had suffered none at the time of the institution of his action.

2o. That the demand claiming the suppression of the defendant's wharf could only be sustained upon proof that the wharf had been erected, in whole or in part, on the bed of the river.

3o. That a riparian proprietor has a right to protect his property, and to reclaim by the construction of wharves, or otherwise, what may have been encroached upon by the waters ; provided the exercise of this right causes no change in the course of the river which may be prejudicial to his neighbor.

Jugement rendu le 7me jour de mai, 1860.

Sir L. H. LaFontaine, Bart., Juge-en-Chef.—Je dois de suite déclarer que je partage l'opinion de mon honorable confrère, M. le Juge Meredith, presque dans toutes ses parties, et que, par conséquent, je suis d'avis que le jugement dont est appel, doit être confirmé, du moins en autant qu'il déboute le demandeur de son action.

L'appréciation que mon honorable confrère a faite de la preuve, me dispense d'entrer dans les détails de la cause. Mes remarques ne porteront donc que sur quelques-uns des points qui me paraissent être les plus saillants.

Le demandeur et le défendeur sont voisins ; leurs propriétés ne sont séparées que par la rivière Beauport. Cependant il ne paraît pas exister de rapports de bon voisinage entre eux. S'il en existe, ces rapports ne se manifestent que par des procès. De là des récriminations sans fin, récriminations qui, dans cette cause, ne se sont pas bornées aux parties elles-mêmes, mais ont passé aux experts qui en ont usé avec une libéralité tout-à-fait prodigue. L'absence de ces récriminations n'aurait cependant pas exposé les parties ou les experts à aucun reproche de la part de cette Cour.

Quoiqu'il en soit, cette cause doit être jugée, et elle doit l'être d'après la preuve des faits, telle qu'elle apparait au dossier, et non pas d'après de simples suppositions que cette preuve pourrait faire naître.

Du côté sud-ouest de la rivière Beauport, où est située sa propriété, le demandeur a fait construire un quai en 1850 ; du côté nord-est où est située la propriété du défendeur, celui-ci a fait construire deux quais, l'un en 1851, et l'autre en 1852. C'est à l'occasion de ce dernier quai que l'action du demandeur a été intentée. Elle a un double objet, 1o. réclamation de dommages, 2o. démolition du quai construit par le défendeur en 1852. Ce quai était à peine achevé, lorsque l'action fut intentée. Le bref de sommation porte la date du 29me. octobre, 1852 ; et le fait de la construction que l'on impute à crime au défendeur est allégué, dans la déclaration, avoir eu lieu, " on or about the 6th day of october instant, (1852), and on divers other days and times between that day and the issuing of the summons in this cause against the defendant." Il est évident que, si la construction faite par le défendeur en 1852, était de nature à causer, dans certaines occasions, des dommages au demandeur, celui-ci n'en avait pas encore éprouvés, lorsqu'il introduisit son action. Nulle preuve n'a été faite à cet égard ; même plus, il a été admis de la part du demandeur, lors de la plaidoirie à l'audience, qu'en effet il n'y avait pas eu de dommages appréciables.

Ainsi, la partie de l'action, qui a pour objet de réclamer des dommages, ne peut donc pas se soutenir.

Quant à la deuxième partie de la demande, celle qui a pour objet la démolition du quai de 1852, elle ne pourrait tout au plus être admissible qu'en autant qu'il serait bien établi que ce quai a été construit, soit en entier, soit en partie, sur le lit de la rivière Beauport.

Or la masse des témoignages, même de ceux recueillis avant le renvoi aux experts, l'opinion des experts eux-mêmes, tout me convainc que, lorsque le quai de 1852 a été construit, il l'a été en entier sur le terrain du défendeur. A ce point de vue de la preuve, je dois nécessairement en venir à la conclusion que la deuxième partie de la demande ne pouvait se soutenir, et que par conséquent le juge de première instance a également bien jugé sous ce rapport.

Il a aussi été question d'une petite île et d'un chenal coulant au nord-est de cette île, du côté du défendeur, lequel chenal, dit le demandeur, aurait été comblé par son adversaire lors de sa construction de 1852. Encore, sur ce point, je trouve que la preuve est contre les prétentions du demandeur. Cette preuve est corroborée par le rapport des deux experts, MM. Baillargé et Stavelly. "In our opinion, no canal, channel or passage existed in the year 1852, at the time of the construction of the defendant's wharf at the place of its erection from X down Z (the trees and stumps of trees existing all along the bank behind the wharf from X to Y being pretty good evidence of themselves of the truth of this assertion)." Puis, ils sont portés à croire, d'après un protêt fait par le demandeur en 1851, que, si un canal a existé en cet endroit, ce canal a dû être comblé par le quai que le défendeur a construit en 1851. Le demandeur ne se plaint pas, dans son action, de la construction de ce dernier quai, mais seulement de celui que le défendeur a érigé en 1852; or le chenal n'existait pas à cette époque.

Le demandeur a encore prétendu que, depuis la con-

struction du quai de 1852, les bateaux qui remontent la rivière Beauport vers son moulin, ou vers le pont qui est un peu au-dessus, ne peuvent plus virer de bord, à raison du rétrécissement du canal de la rivière, qui aurait été causé, dit-il, par la construction de ce quai, et que, par conséquent, il en éprouve des dommages. Ce sont là deux prétentions que la preuve ne permet pas d'admettre. Nécessairement, ces prétentions se rapportent au temps de l'introduction de l'action, et non pas au changement des lieux, qui a pu survenir depuis. Comme il est établi que le quai de 1852 a été construit en entier sur le terrain du défendeur, le lit de la rivière a dû, après cette construction, nécessairement avoir la même largeur qu'il avait auparavant. Si un bateau pouvait y virer de bord, avant la construction du quai, il pouvait également le faire après. En supposant même un rétrécissement causé dans le canal de la rivière, le demandeur ne serait pas bien venu à réclamer des dommages, puisqu'il n'a pas prouvé en avoir soufferts. Il n'a pas même prouvé qu'il ait jamais conduit un bateau à son moulin, pour y charger ou décharger des farines ou des grains.

Si le quai du défendeur a eu l'effet d'encaisser d'avantage la rivière Beauport, c'est un endiguement qui, considéré par lui-même, et indépendamment des débordements ou des glaces, a dû ajouter à la navigabilité de la rivière par l'élévation correspondante de ses eaux. Ainsi, sous ce rapport, le demandeur n'aurait, dans le cas précité, aucun sujet de se plaindre.

Il me reste à dire un mot de la dernière question, celle de l'obstruction apportée au cours de l'eau par l'entassement des glaces, causé par le quai du défendeur, laquelle obstruction a, prétend-on, l'effet de refouler les eaux sur les roues du moulin du demandeur, et d'en arrêter les mouvements durant un temps plus ou moins long. Je partage l'opinion de mon confrère, M. le juge Meredith, sur la nature de la preuve offerte par le demandeur pour établir le fait de cette prétendue obstruction. Cette preuve n'est

pas assez claire et précise pour nous faire attribuer cette obstruction au quai construit par le défendeur. Elle est même contradictoire sur plusieurs points. Du reste, voici comment s'expriment MM. Baillargé et Stavely : " We cannot however arrive at the conclusion that the wharf of 1852 is, at least to any sensible extent, the cause of the difference in the time of stoppage under ordinary circumstances, that is, during high tides unaccompanied by freshets or jams of ice." C'est donc dans des débordements, ou dans des circonstances extraordinaires, que le quai du défendeur pourrait quelquefois contribuer un peu à la suspension du mouvement des roues du moulin. Dans tous les cas, cela n'a pu avoir lieu entre le temps de la construction du quai et celui de l'introduction de l'action. Le demandeur est-il lui-même sans reproches ? N'a-t-il pas le premier, dès 1850, fait construire un quai qui empiète sur la rivière ? N'est-il pas prouvé que ce quai faisait rejeter les eaux sur le terrain du défendeur ? Le défendeur n'était-il pas justifiable de faire à son tour des travaux pour se protéger ? On dira peut-être que, si le demandeur a lui-même, par la construction de son quai, empiété sur la rivière, et a par là agi illégalement, cela ne justifiait pas le défendeur de faire la même chose. Admettons cela pour un moment, toujours faudra-t-il convenir que le demandeur ne devrait pas être facilement reçu à se plaindre, lorsque c'est lui qui a le premier donné l'exemple, et surtout lorsqu'il n'établit pas qu'il lui soit arrivé aucun dommage du fait qu'il impute à son adversaire. Celui-ci, voulant protéger sa propriété, peut invoquer Daviel, t. 1, no. 692 : " La faculté de munir et de fortifier contre l'action des eaux les rives de son héritage, de reconquérir par des travaux de cette sorte ce que l'action des eaux a enlevé, est un accessoire essentiel du droit de propriété ; c'est le droit naturel de conservation.".... No. 693. " Mais l'exercice de ce droit, si incontestable en principe, doit être, dans la pratique, combiné avec une condition bien difficile à remplir, celle de n'apporter au cours des eaux aucun changement préjudiciable au voisin." No. 694.... " Les

tribunaux ont donc à cet égard une grande latitude d'appréciation. Il leur appartient de balancer les positions respectives des propriétaires intéressés, les inconvénients qui peuvent exister de part et d'autre, et ils doivent, à fin de cause, maintenir toute disposition qui est pour l'un d'une nécessité évidente, sans causer aux voisins d'autre préjudice que la privation des relais qui s'opéraient de leur côté aux dépens de la rive opposée. " Dans les affaires de cette nature, dit très bien M. Chardon, les magistrats et les hommes de l'art par eux consultés doivent s'arrêter à cette idée que les riverains combattent ensemble contre un ennemi commun ; qu'ils ont les mêmes droits à conserver, les mêmes chances à courir ; qu'ils doivent donc se tolérer réciproquement, et ne se contrarier que lorsqu'il y a évidemment abus de la faculté commune à tous." Si on fait ici l'application de l'autorité de Daviel, assurément on ne sera pas disposé à accueillir favorablement la plainte d'un voisin qui ne prouve pas avoir souffert aucun dommage.

Il reste une autre question qui touche aux honoraires que l'intimé réclame en Cour d'Appel, où l'intimé, qui est avocat et procureur, a comparu en cette qualité pour lui-même. La question n'a pu se présenter dans la première cour où l'intimé avait comparu et s'était fait représenter par un autre avocat et procureur.

Les honoraires qui sont accordés dans nos cours de justice, ne le sont pas au profit des parties elles-mêmes, mais bien au profit seulement de leurs avocats et procureurs ; d'où est venu le privilège, pour ces derniers, de demander la distraction de dépens. L'intimé, M. Gury, ayant comparu en appel comme avocat et procureur de M. Gury, intimé, pourrait-il faire une motion en distraction de dépens, c'est-à-dire, pourrait-il demander que les dépens accordés à M. Gury soient payés à M. Gury ? La chose me paraît absurde.

Je n'ai jamais vu, dans la Cour à Montréal, un avocat et procureur comparaître pour lui-même en cette qualité.

Aussi je n'y ai jamais vu se présenter la présente question. Il paraît que ce n'est que depuis quelque temps qu'à Québec cet usage illégal et abusif d'accorder des honoraires à l'avocat et procureur qui comparaît pour lui-même, s'est, dit-on, introduit. Encore les quelques cas que l'on cite, sont-ils des cas où cette adjudication d'honoraires aurait eu lieu *sub silentio*, c'est-à-dire, des cas dans lesquels l'attention des tribunaux n'aurait pas été appelée à la question. Cela ne fait pas même jurisprudence. Il est temps d'apporter un remède, notre attention étant appelée pour la première fois à ce sujet. C'est le droit français, et non le droit anglais, plus ou moins contradictoire sur ce point, qui doit fournir la règle de décision.

Les rapports d'une partie avec son avocat et procureur, sont fondés sur un contrat de mandat. Or, ce contrat suppose nécessairement deux personnes qui contractent, le mandant et le mandataire. Il est absurde qu'un pareil contrat puisse être intervenu entre M. Guky, partie intimée, et M. Guky, avocat et procureur. Ceci peut être démontré bien fortement ; dans le cours du procès, il aurait pu s'agir d'une *inscription de faux*. L'avocat ou le procureur qui veut adopter ce procédé est obligé, avant de formuler l'inscription de faux, ou de répondre à cette inscription, d'obtenir de son client, et de produire en Cour, une procuration par écrit. M. Guky, défendeur, donnera-t-il à M. Guky, avocat, une telle procuration ? Le défendeur et l'avocat ne sont qu'une seule et même personne. On voudrait en faire une dualité que je ne peux pas reconnaître. M. Guky a le droit, s'il est poursuivi, ou s'il poursuit, de comparaître lui-même. Mais c'est la partie qui comparaît en personne, et non l'avocat ou procureur. La partie qui comparaît ainsi, a bien droit à ses déboursés, si elle obtient gain de cause, mais non à des honoraires.

Notre jugement reconnaît que M. Guky a droit à des honoraires en Cour de première instance, car là il a comparu par un autre avocat et procureur, mais il lui refuse des honoraires dans cette Cour, parce qu'ici, ayant comparu lui-

même, il n'a comparu et n'a pu comparaître que comme partie. Le jugement est rédigé de manière à établir une règle qui puisse s'appliquer à tous les cas, que la partie à un procès ait agi elle-même dans une partie de ce procès, ou qu'elle ait agi par avocat ou procureur dans une autre partie.

Le jugement est comme suit :

" Seeing that in the judgment of dismissal of the action of the appellant, in the Court below, with costs, from which the present appeal hath been brought, there is no error, it is considered and adjudged by the Court, now here, that the same, to wit : the judgment rendered in the Superior Court sitting at Quebec, on the first day of February one thousand eight hundred and sixty, be, and the same hereby is, affirmed with costs, in both courts : in the taxing whereof, no attorney's or other fees, upon any of the proceedings or hearings had in either court, shall be allowed to the respondent, by reason of his being a practising attorney, and of his having personally conducted his own defence."

Dissentientibus as to the judgment of confirmation on the merits, Aylwin and Duval, and as to the judgment concerning the mode of taxing costs, Meredith and Mondelet.

PENTLAND et PENTLAND, pour l'appelant.

BOSSÉ et PARKIN, Conseils.

GUY, pour l'intimé.

QUEEN'S BENCH, }
IN APPEAL.

DISTRICT OF QUEBEC.

Before :— SIR L. H. LAFONTAINE, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

GUGY..... *Appellant.*

and

FERGUSON..... *Respondent.*

Held :—1o. That a plea by way of exception will not be rejected because it is argumentative, or because facts are set forth in such plea which could have been given in evidence under the general issue.

2o. That a plea in the nature of a plea of justification, in an action of slander, will not be dismissed because it does not contain an admission of the use of the words intended to be justified.

3o. That an attorney, a party to an action, conducting his own cause, cannot recover fees from the adverse party as if he were acting as the attorney of another person.

Jugé :—1o. Qu'un plaidoyer par forme d'exception ne sera pas rejeté parcequ'il est argumentatif, ou parce que des faits sont allégués dans tels plaidoyers qui auraient pu être prouvés sous une défense aux fonds en fait.

2o. Qu'un plaidoyer de justification, dans une action pour injures verbales, ne sera pas rejeté parce qu'il ne contient pas une admission que les paroles que l'on entend justifier ont été proférées.

3o. Qu'un procureur, partie à une action, conduisant sa propre cause, ne peut recouvrer ses honoraires de la partie adverse de même que s'il agissait comme procureur d'une autre personne.

Judgment rendered the 7th day of May, 1861.

MONDELET, Justice.—The respondent having sued the appellant in damages, in the Court below, alleged to be caused by the appellant having, in the presence of *experts* before whom the appellant and one Wm. Brown were proceeding in a cause then pending between them, stated that the respondent was a “perjured scoundrel,” the appellant pleaded a special plea, whereby not confessing having used the very words imputed, he claimed he had a right and privilege to use words which were no more than a legitimate comment upon what the respondent had sworn to, who had in the course of his deposition testified to a fact which he the respondent could have had no knowledge of, it having occurred two years before he ever came to the country; and the appellant described and recited the circumstances under which the words complained of were used.

There is besides a *défense au fonds en fait*.

The respondent demurred to the special plea ; and the parties having been heard upon this demurrer the Court dismissed the plea :—

1st. Because it amounted to no more than a *défense en fait* or general issue.

2nd. Because the plea was argumentative.

Now the first reason is contrary to fact, the plea is affirmative and could not have been the legitimate subject of a *défense en fait*, or general issue.

As to second reason, that the plea is argumentative, it is untenable in our system, there is no harm in that, the plea is correct. It should not have been dismissed.

The plaintiff has been allowed to adduce evidence to make out his case, the defendant has been refused this privilege. In vain will it be said that the defendant has had witnesses heard and has had full opportunity to justify : this is not the case, his pleas were dismissed, and he was not allowed to prove what he pleaded because his plea had been illegally dismissed.

My opinion is that where a plea of justification is pleaded, admitting the words spoken, they are of course thereby made out to have been used, and unless the defendant justifies, he must be condemned if the words are actionable.

But if it be impossible for the defendant to say whether or not he used the words, he may plead as he has done here.

As to his right of using such expressions (supposing them to be justified by the fact) before *experts*, I think it does exist, they are the officers of the Court though they are not judges, and if a party has a right to prove a witness to be a perjurer, and then of course, a perjured scoundrel, he must, *il va sans dire*, have the right to say so.

If it be pretended that the defendant should have been punished if he had used such expressions in open Court, it does not follow that he should pay damages to the

party because the *experts* had no authority to fine him, suppose he laid himself open to such a fine ; it much less follows that he is to be mulcted in damages to the party, such a conclusion is neither legal, nor logical, it would simply be ridiculous.

The judgment, therefore, (I mean the first judgment dismissing the plea,) being wrong, the whole of the proceedings, including that judgment, should be set aside and the parties ordered to go to proof on the issues as raised by the pleadings.

Another very important question has been raised in this case—this question may be stated as follows.—Can a practising barrister who appears as his own attorney recover costs against his adversary ?

After very prolonged discussion upon this subject, I have come to the conclusion that the appellant is entitled to recover his costs from the respondent who fails.

1o. The Court has recognised him as appearing for the defendant—it would be most unjust to ignore him at present.

2o. He is an advocate and attorney, he has his action as such, there is a tariff, and we cannot deny the fees he is entitled to under this tariff.

3o. That the party in the cause cannot give to the attorney a power of attorney, *ad negotia*, I admit ; but as to the power of attorney *ad lites*, it is quite different.

4o. Upon *inscription de faux*, the question of power cannot arise, the party is present, he himself takes the proceeding, he is present in person, and the effect of his presence is equivalent to the presence of any party in Court authorising his attorney personally to make the *inscription de faux*.

5o. As to the *distriction de dépens*, the same answer can be given, such a proceeding would be as useless as it would be absurd, the attorney, a party in the cause, does not

require it, inasmuch as *la distraction* could not in any case prevent compensation.

60. Being a party to the cause, if he failed would he not be compelled to pay the costs of the adverse party? there would then be inequality of rights between the parties.

70. If the appellant had employed an attorney, or rather if he had procured the signature of an attorney to the pleadings, would he not have recovered his costs?—Could the respondent have avoided such payment?—Certainly not.

80. As to the danger of personal collisions, would not, though the appellant had procured the signature of another attorney have himself conducted the proceedings?

90. With respect to the authority derived from Jousse, *Justice Civile*, it is not applicable here, in Canada, where advocates are also attorneys. It must be recollected that in France, the right of action for fees was not only denied to advocates—but such as claimed them, *en justice*, were struck from the roll.

MEREDITH, Justice.—The first question to be determined in this case, is as to whether the appellant's complaint, with respect to the rejection of his exception, is well founded.

The exception was rejected as being argumentative, and as amounting merely to the general issue. There can be no doubt that under the rules of pleading which formerly obtained in England, pleadings were not allowed to be argumentative, and that under the same rules, "if a party "pleaded, in a more special way, matter, which was "constructively, and in effect, the same as the general "issue, such a plea would be bad." (1)

But these strict technical rules are no longer in force, even in England, and as showing what is now the English doctrine on this subject I may refer to an interesting article to be found in the last number of the Law Magazine under

(1) Stephen on Pleading, p. 448.

the head of "Pleading of the present day," to which my attention has been drawn by Mr. Justice Aylwin. At page 240, the writer says. "In the next place, instead of pleading by way of traverse," (or general issue) "the pleader may set out the facts or plead *argumentatively*; and if he entertains the slightest doubt, whether the facts he wishes to rely on would be admissible under a traverse" (or plea of general issue) "he would now be guilty of gross neglect to plead the traverse simply."

The rule of our own law is that no form of action, or of words, is necessary in any pleading, but "the parties may and shall respectively state *bona fide*, and to the best of their belief, the real facts on which they intend to rely." I cannot discover any thing in the rule thus laid down in our statute, which would justify us in rejecting a plea on account of its being argumentative, or because facts are set forth in a special plea, which could have been given in evidence under a simple denial. What injury does a plaintiff suffer from the facts relied on by a defendant being stated in an argumentative form, as we see may now be done in England; or what reason has a plaintiff to complain, if a defendant instead of filing a general denegation, sets forth *bona fide* the real facts upon which he intends to rely, even although he might have proved those facts under the general issue. To maintain technical objections such as those now being considered would, it seems to me, be contrary not only to the statutory enactment already referred to, but also to the general principles of our own law; and would tend to establish here, rules which, after having been long in force in England, have been rejected there as being worse than useless.

Having thus stated succinctly my views as to the reasons assigned in the judgment for the rejection of the defendant's plea, I shall now proceed to consider the objection taken by the plaintiff to that exception, namely—that it amounted to a plea of justification, and yet did not contain any admission of the making of the statements it attempted to

justify. It is true that formerly the rule in England was, "that pleadings in confession and avoidance should give colour:" and Mr. Stephen (p. 228) says that the meaning of this rule is that pleadings in confession and avoidance: "should confess the matter adversely alleged, to such an extent, at least, as to admit some apparent right in the opposite party which requires to be encountered and avoided by the allegation of new matter."

The english rule "that pleadings in confession and avoidance should give colour" did not cause any injustice because it was accompanied by another rule to the effect, "that whatever is admitted in any issue is admitted only for the purposes of that issue," or in other words that "a fact admitted in one plea cannot be taken to prove or disprove another." (1)

And if according to the practice of our courts it were certain, or even if the Judges of this Court were unanimously of opinion, that an admission in a plea could not be used for any purpose beyond the issue raised on such plea, I would feel that no practical injustice could result from our adopting the english rule on this subject. But the decisions of our Courts, on this point, are unfortunately conflicting; and the judges of this Court are not agreed as to the effect of an admission contained in a plea. Such being the case it seems to me that it would be most unfair to a defendant in an action for slander, to subject him to the english rule requiring an admission of the use of the words attempted to be justified; without, at the same time, letting him have the benefit of the safeguard by which that rule was in England accompanied, namely, that an admission which a party pleading is so compelled to make, is not to be used to his prejudice, as proof under any other issue.

The case before us is an instance of the injustice which might thus be produced.

(1) See the observations of Baron Parke and Lord Abinger, 1 M. and W., p. 173.

The defendant has not only denied that he used, but has proved by a highly respectable witness he did not use the language attributed to him, nevertheless two witnesses, equally respectable, prove the contrary; and thus, although the defendant cannot make any admission, he is plainly in want of a plea in the nature of a plea of justification; and indeed without such plea, may, perhaps, be prevented from proving facts material to his defence.

The objection that a defendant ought not to be allowed to justify words, which he does not admit he used, is not so conclusive as may, at first sight, appear; because the necessity for a plea of justification, does not depend so much upon the fact of the defendant having used the words attributed to him, as upon the power of the plaintiff to establish that the defendant did use such words; and a defendant may know that although he did not use the language of which his adversary complains, yet that the use of those words, will be proved against him; and thus a plea of justification may be absolutely necessary in a case in which it would be impossible for a defendant, consistently with his own interests, or even with truth, to make an admission. Moreover I do not see that the allowance in an action for slander of a plea of justification, not containing an admission of the words charged, could in any case afford a plaintiff just cause of complaint; for if the charge made by a plaintiff were true, I mean if the defendant sued, really used the words imputed to him, then a plea of justification would plainly be necessary; and, on the other hand, if the charge made by a plaintiff were untrue, the plaintiff could not complain of the filing of a plea rendered necessary by an untrue charge made by himself.

Such being my views with respect to the rule under consideration it is satisfactory to me to find that they are not opposed to what is the present practice in England; as I think may be inferred from the valuable article in the law magazine to which I have already adverted, at page 240,

the writer says : " We have already shewn that he (the defendant) need not plead by way of traverse, and it is equally clear he need not plead by way of confession and avoidance. *If he pleads facts, disclosing a substantial answer to the case against him, he will succeed though he does not confess or even give colour, and though his plea may be any thing but a traverse.*" I may also observe that in an action for slander recently before this Court, (1) a defendant was allowed to have the advantage of a plea, in the nature of a plea of justification, although the defendant denied all the allegations contained in the plaintiff's declaration. In that case the defendant strenuously contended that " every justification pleaded must expressly or tacitly admit the fact which it is intended to justify," and argued " that it was absurd to plead in avoidance of a fact which the plea does not admit ; " but the pretensions of the plaintiff, in this respect, were not maintained either in the Court below, or in this Court.

It is true that the defendant in that case was condemned, by a majority of the judges, to pay a small sum as damages ; but this was done, not because the defendant's plea was considered bad, or his evidence inadmissible, but because the proof adduced did not justify the language which he had used. One of the learned Judges who dissented was of opinion that the plaintiff ought to have been given damages of a shilling merely ; and the other learned judge who dissented, agreed with the learned judge in the Court below, in thinking that the defendant had completely justified the observation made by him with respect to the plaintiff ; thus admitting in the clearest manner the sufficiency of the plea.

Upon the authority of the case just cited, but still more upon the reason of the thing, I hold that a plea in the nature of a plea of justification, in an action for slander,

(1) Steel, appellant, and Gilman, respondent, from Sherbrooke decided in appeal, December, 1860.

ought not to be dismissed merely because it does not contain an admission of the use of the words intended to be justified.

It has been suggested that it is unnecessary, in the present state of the record, to consider the order overruling the defendant's exception; because the defendant was allowed to put of record Ferguson's deposition which he impugns as untrue; and it is said that this is all he could have done even had his exception, which was rejected, remained of record.

When this suggestion was first made, I was inclined to think that it might relieve us from the necessity of adjudicating upon the question of pleading already adverted to; but upon further consideration I cannot satisfy myself that it ought to have that effect.

It is possible, nay perhaps probable, that the defendant may not be able to adduce in support of the plea under consideration, any material evidence beyond that already adduced; but we have no means of knowing that such is the case, and have no right to presume it.

The defendant, according to my views, as already explained, had a right to file, and for any thing we can know to the contrary, had an interest in filing that plea; and, as it has been rejected, I think we are bound to reverse the judgment setting it aside; and to afford the defendant an opportunity of adducing further proof, if any he have in support of it. As I have arrived at this conclusion, upon the point to be first determined in this cause, I do not propose to enter upon the consideration of any of the other questions affecting the merits of the cause.

As to the question, raised in this case and several others, whether an attorney conducting his own case can recover fees in the same way as if he were acting for another person, I must say that it has presented some difficulty to my mind. The tariff under our statute, as has been

remarked, is made for officers of the Court ; it may therefore be said that if an individual, not an attorney, were to conduct his own case, he could not be awarded the fees contained in the tariff for attorneys; and it is further argued that a man cannot act as an attorney for himself, because, in such a case, no contract of agency can intervene. Still it is undeniable that the defendant is an attorney, and that he has performed certain services in this cause, for which, when performed by an attorney, the tariff allows certain fees, and I really cannot see any thing in law, or in reason, to prevent the defendant, an attorney, from receiving the fees usually incident to the services which he so performed.

If the objection urged against the appellant be well founded it ought to have as much weight in England as it has here ; and yet we know that it would not be maintained there. The rule on this subject is, " that where an attorney " is a party to an action, and obtains a judgment in his " favour, he is entitled to the same costs as if he had " conducted the action as attorney for some other person ; " and not merely to the costs which another person suing " or defending, in person, would be entitled to ; " (1) and in support of this opinion Archbold cites several cases. The french authorities are divided on the point. Serpillon (p. 565) declares that even a private individual gaining his own cause is entitled to full costs ; whereas Jousse is of a contrary opinion.

The practice in this country may I think be said to be in favour of the Attorney. The prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief-Justice Sewell fees in such cases were not allowed ; but that in the time of Sir James Stuart the practice was to allow them ; that the last mentioned practice has continued ever since ; and he has given us a

(1) Archbold's Practice, Vol. 1, p. 48.

note of four cases, (1) in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances, I think it doubtful whether any change in the practice as to this matter, ought to be made; and that if a change were determined on it ought to be made so as not to affect pending cases. Indeed it would seem to me hardly just, that an attorney having conducted his own case to the close, without any objection on the part of his antagonist, or of the Court, should be informed, at the last moment, that he could not legally do that, which he actually had done, with success, in the presence of the Court.

I therefore think that the appellant ought to have his costs. (2)

The judgment is as follows:—

Seeing that in the judgment of the Court below, by which the demurrer to the perpetual exception pleaded by the appellant, has been maintained, there is error, inasmuch as the said exception contained issuable matter.

Seeing that the appellant by reason of the overruling of his said exception was prevented from bringing out upon cross examination evidence which might have supported the same, as well as from directly adducing evidence upon his said plea, in which respect there is likewise error: it is considered and adjudged by the Court of our Lady the Queen, now here, that as well the said judgment, to wit: that rendered in the Superior Court sitting at Quebec, on the twelfth day of October, one thousand eight hundred and fifty nine, as the final judgment rendered in the cause on the sixth day of February, one thousand eight hundred and sixty, be and the same are, hereby reversed, set aside

(1) No. 1417, of 1857, Pentland and Smith:—No. 1959, of 1859, Stuart and Miller:—No. 2148, Pentland and Bell, 1859:—No. 2147, Pentland and Bell, 1859: to which may be added Circuit Court, No. 1025, 29 June, 1851, Cannon vs. Henley, also, cited No. 2133, of 1856, Allen and Gilbride, not verified by me.

(2) For the opinion of the Honorable the Chief-Justice upon the question of costs, see the case of Brown and Gagy, *supra*, p. 406.

and vacated, and proceeding to render the judgment which the Court below ought to have given, it is further considered and adjudged that the said demurrer pleaded by the respondent to the said exception be overruled, that all, each and every the proceedings had and taken in the Court below, from, since and after the said twelfth day of October, one thousand eight hundred and fifty nine, be held for nought and set aside, and the parties be placed in the same plight and condition as they stood in Court on the said last mentioned day, to the end that such further proceedings be had and taken as to law and justice appertain in the premises, with costs to the appellant in this behalf, as well in the Court below as in the Court here, in the taxing whereof no attorney's or other fees upon any of the proceedings or hearings had in either court shall be allowed to the appellant by reason of his being a practising attorney, and of his having personally conducted his own defence.

Dissentientibus, the Chief-Justice and Judge Duval, as to the judgment of reversal, and the Honorable Messrs. Justices Meredith and Mondelet, in so far as respects the mode of taxing costs. (1)

GUGY, for appellant.

PENTLAND and PENTLAND, for respondent.

PARKIN, counsel.

(1) Mr. Justice Aylwin was with the majority upon both questions, namely, as to the reversal on the judgment, and as to the mode of the taxing of costs.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL SIDE.

Before :—SIR L. H. LaFontaine, Bart., Chief-Justice,
 AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

GUGY..... *Appellant.*
 and
 DONAGHUE..... *Respondent.*

Held:—1o. That it is not necessary that the declaration annexed to the writ should contain the domicile and addition of the parties

2o. That, in the case submitted, the plaintiff still had his domicile in the city of Quebec.

3o. That it is not absolutely necessary, although it is desirable, that the judgment should be rendered by the judge who hears the evidence; this matter having been left to the discretion of the judges holding the Superior Court.

4o. That the making of an order that all the witnesses shall withdraw, except the one under examination, is not demandable of strict right.

Jugé :—1c. Qu'il n'est pas nécessaire que la déclaration annexée au writ contienne le domicile et les qualités des parties.

2c. Que, dans l'espèce, le demandeur avait encore son domicile dans la cité de Québec.

3c. Qu'il n'est pas absolument nécessaire, quoique désirable, que le jugement soit rendu par le juge qui a entendu les témoignages; cette matière ayant été laissée à la discrétion des juges siégeant en Cour Supérieure.

4c. Qu'une partie n'a pas strictement le droit de demander qu'il soit ordonné que tous les témoins se retireront, à l'exception de celui qui subit son examen.

Judgment rendered the 7th day of May, 1861.

MONDELET, Justice :—The appellant complains of a judgment of the Superior Court for Quebec, whereby his *exception à la forme* was dismissed, on the 4th February, 1860.

The grounds of the *exception à la forme*, are :

1o. That in the declaration annexed to the writ, the domicile and addition of the parties is not contained. This reason which, in the exception, ranks last, should have been the first.

I am of opinion that we have no right to distinguish between the cases of the Superior and the Circuit Court as to the necessity of the parties having their domicile and addition described in the declaration. (1)

It is fatal : the *exception à la forme* ought to have been maintained.

1) Ordonnance 1667, art. 2, tit. 2. (Des ajournements).

20. Plaintiff is styled as "of the city of Quebec, in the county of Quebec, printer." Now there is no city of Quebec in the county of Quebec.

Whatever may be said or thought of that objection in other respects, it is not the less a valid one, and one which should have been maintained.

30. Plaintiff is described as of the city of Quebec, whereas at the time of the suing out of the writ, and for a long time before, the plaintiff had no *domicile* in Lower Canada, but on the contrary had his domicile in the city of New-York.

It is proved that long before and at the time of the issuing of the writ, plaintiff had his domicile in the city of New-York. If so he could not at the same time have a domicile in the city of Quebec, he could have only one domicile.

There again the defendant was right and should have succeeded.

40. No adjudication upon the defendant's motion for a *Commission Rogatoire*.

This objection is fatal, a judgment by the ordinances is null, and is even open to the *requête civile*, when essential proceedings have not been adjudicated upon. The motion of the 9th of January was continued to the 2nd of February, and never was adjudicated upon.

It is not because the defendant did not at any stage of the proceedings produce and file his interrogatories, that the omission by the Court to adjudicate upon the motion, is or can be said to be regularised, cured or legalized, it remains there a fatal omission.

Nor can it be said that it is a waiver of the objection ; it can never be twisted into such a forced construction of an intention to waive such a formidable objection.

50. Motion for order to witnesses to retire.

I am not certain that this is fatal. It certainly should be.

60. Judgment not rendered by the Judge who heard the witnesses.

The law should be so, but it is not clearly enough so to justify the Court of appeals to say it is.

There are several reasons in the *exception à la forme*, which ought to have been pleaded by a *défense au fonds en droit*, but the plaintiff has not said a word about that.

I am decidedly of opinion that the judgment of the Court below should be reversed, there being more than "purely imaginary" matters in the defendant's *exception à la forme*.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef.—Action en dommages à raison d'emprisonnement illégal.

Le bref de sommation contient la qualité et le domicile des parties, mais la déclaration n'en fait pas mention. Le demandeur est désigné dans le bref, comme étant domicilié dans la cité de Québec, comté de Québec.

Exception à la forme, à l'appui de laquelle le défendeur allègue plusieurs raisons plus ou moins valables les unes que les autres. On pourrait peut-être soutenir que la dernière raison alléguée paraît être bonne et suffit pour faire débouter le demandeur de sa présente action, si, nonobstant la mention du domicile du demandeur dans le bref de sommation, il est encore nécessaire que ce domicile soit indiqué dans la déclaration. La *déclaration* a été substituée à la requête de l'ancien droit français; mais elle n'en est pas moins pour cela la partie principale de l'ajournement et de la citation. C'est elle qui contient le *libellé*, les conclusions et les moyens de la demande, aux termes de l'ordonnance de 1667, titre 2, art. 1, et qui, de même doit contenir ce qui est exigé par l'article 2, et qui est encore applicable en ce pays, elle devrait donc faire mention du "domicile et de la qualité de la partie." Mais, en admettant même que la mention qui en est faite au bref de sommation devra être regardée comme remplissant le vœu de

l'ordonnance, l'exception à la forme sous ce rapport est fatale au demandeur. Car il est prouvé qu'au temps de l'action le demandeur n'avait pas de domicile dans la cité de Québec, qu'il n'y résidait pas, qu'au contraire il résidait à New-York. Cela a été admis par son avocat dans le cours du procès, et l'admission a été couchée dans les registres de la Cour. Si l'on prétend que cette admission ne doit se rapporter qu'à l'époque où elle fut faite, cette prétention ne pourrait pas tenir en présence de ce qui a eu lieu antérieurement dans la cause. Le 7 novembre, 1859, le défendeur fait motion que le demandeur soit tenu de donner caution pour les dépens, attendu, dit cette motion, qu'au temps où l'action a été intentée, le demandeur n'avait pas de domicile dans le Bas-Canada, et en était alors absent, *nisi causa*, le 1er décembre suivant. Ce jour là, l'audition sur cette motion est remise au 5. Le 5, les parties sont entendues et la motion est prise en délibéré. Puis le 6, la *règle* est déclarée *absolue* "no cause being shown against the said rule," c'est-à-dire que les allégations de la motion n'ayant pas été contredites par le demandeur, elles sont prises par la Cour pour affirmées, et en conséquence le demandeur est obligé de donner caution, ce qu'il fait le 14 du même mois, et la preuve faite plus tard vient appuyer les allégations de la motion.

MEREDITH, Justice.—The appeal in this case, is from a judgment of the Superior Court, dismissing an *exception à la forme*, filed by the appellant as defendant in the Court below.

The first of the grounds of his exception, which the defendant urged in his argument before this Court was—That the declaration in the Court below does not disclose the domicile and addition of the plaintiff.

The practice, in the Superior Court, has been to give the domicile and addition of the parties, as well in the declaration, as in the writ; but the practice in the Circuit Court, even in appealable cases, is otherwise; and the practice of

the latter Court seems to me to be the more reasonable of the two; for the writ, which contains the addition and domicile of both the parties, is part of the *exploit*, and I can see no advantage in giving the domicile and addition of the parties, twice in the same *exploit*. I therefore think, that under our system the objection now being considered was rightly overruled.

The second of the grounds of his exception relied on by the appellant was—That in the writ, the plaintiff is styled “ of the city of Quebec, in the county of Quebec, printer,” whereas no city of Quebec can be found in the county of Quebec.

The city of Quebec, strictly speaking, is not now in the county of Quebec; but as this inaccuracy could not possibly mislead the defendant, or any other person, I do not think it ought to be held fatal.

The third of the grounds of his exception argued before us by the appellant was—That the plaintiff is described in the writ and declaration as having his domicile in Quebec; whereas at the time of the suing out of the writ and for a long time before the plaintiff had no domicile in Lower Canada; but on the contrary had his domicile in the city of New-York.

It is upon this point that the chief difference of opinion exists between the judges, and this is, certainly, the part of the case which has presented the greatest difficulty to my mind. The witnesses for the plaintiff establish that for a period of about eighteen years immediately preceding the institution of the present action the plaintiff had his domicile in this city; and it is proved that at the time of the institution of this action he was the tenant of a house in this city, in which his father, mother and sister resided. On the part of the defendant it is indisputably established that the plaintiff resided in the city of New-York at the time of the institution of the present action, and that he had been

resident there for a period of about four months before that time.

Richard Kingsley a witness for the defendant also proves that upon one occasion he was seeking for the plaintiff for six months to serve a process upon him, and that the plaintiff had left the country and was gone to New-York. The witness adds. "Had he had a domicile in this city I " would have found him."

It seems however probable that the plaintiff returned to Quebec after the search so made for him by Kingsley, for that witness says he served him with the process.

John McNulty another witness for the defendant says. He sought for the plaintiff within the last two years ; that he had a copy of a Judgment to serve upon him but could not find him, and the witness says that although he now forgets how many months he was seeking for the plaintiff without being able to find him, yet that it was a serious search and that he made endeavours to find him, but in his cross examination this witness says—that he saw the plaintiff several times in Quebec after he so searched for him, and his cross examination closes with these words. "I have " known the plaintiff for the last seven years. I cannot " say whether he resided in Quebec the whole time or not, " but I have frequently seen him in Quebec during that " period, in fact I have seen him the same as I used to see " persons whom I was accustomed to see and whom I " know."

Patrick Ford also a witness for the defendant says that he made search for the plaintiff for a month or so without being able to find him.

Charles Gilbride a witness for the plaintiff, as explaining the causes which induced the plaintiff (who is a printer by trade) occasionally to absent himself from Quebec says, "when printing is not good here, he sets out for other " places. He sometimes remains absent for two, three,

“ four and five months or more. The plaintiff never left Quebec for good.”

Mr. Duggan, advocate, attorney for the plaintiff, but examined as a witness for the defendant says, in effect, that the plaintiff for the last seven years (with the exception of three years) has been in the habit of leaving Quebec on business.

In considering the evidence as to this part of the case we are to bear in mind that under the ordinance of 1667, it is the plaintiff's domicile, and not merely his residence that is to be given in the *exploit* ; and also that in order to acquire a domicile two things are required—firstly, residence, and secondly, an intention of making that residence the home of the party “ for it is not the mere act of inhabitation in a place, which makes it the domicile, but it is the fact of inhabitation coupled with the intention of remaining there *“ animo manendi.”* (1)

Now when it is recollected that the plaintiff had on several former occasions left this city for months together, and afterwards returned ; and that at the time of the institution of this action he was a tenant of a house in this city, it seems to me we could not be justified in saying that the plaintiff by living four months in New-York had lost his domicile here, and acquired a domicile in that city. If between the suing out and return of the writ in this cause, the plaintiff had married and died at New-York, it would hardly be contended that we would be justified in holding, upon evidence such as that in this record, that the mobiliary estate of the plaintiff, and the matrimonial rights of his widow, should be regulated by the laws of the state of New-York, and yet if the plaintiff had not then acquired a domicile at New-York for those purposes, I do not see that in the writ before us, he was bound to mention New-York as his domicile. If this view be correct, then the plaintiff was rightly described in the writ before us as of Quebec,

(1) *Story's Conflict of Laws*, No. 44, and authorities there cited.

because a domicile once acquired is retained until a new one is acquired.

For these reasons I think that the judgment of the Court below is right as to the point under consideration. At least the weight of evidence is not so clearly against it as to justify us in reversing the judgment of the Court below ; and that, for the purpose of maintaining an *exception à la forme* which, it seems to me, might very well have been dispensed with.

The appellant also complains that his exception was dismissed, without any adjudication upon his motion for a *commission rogatoire*.

The motion for the *commission rogatoire* was made on the 9th of January ; and on the same day, the defendant having been heard on his motion, the Court ordered " that " the said motion be, and the same is hereby continued to " the 2nd day of February next."

The entry on the second of February is simply.

" The parties respectively having been heard upon the " merits of the *exception péremptoire à la forme* in this cause " filed, *curia advisare vult*."

On the 4th February judgment was rendered dismissing the exception as to form ; and on the same day the appellant filed a declaration, excepting " to the order of this day " dismissing his *exception à la forme*."

It is to be observed that the defendant did not at any stage of the proceedings produce the interrogatories upon which he desired to examine the plaintiff. The plaintiff's counsel by indicating on the 9th of January the residence of his client may I think be regarded as having waived the objection, which he otherwise might have urged, against the granting of the defendant's motion, on the ground that the motion was not supported by an affidavit. The defendant, however, was then bound to proceed so as not to retard the plaintiff unnecessarily, and I therefore think he ought to have produced his interrogatories on the 2nd

of February, and then prayed for the allowance of his motion of the 9th of January, asking for a *commission rogatoire*. Instead of this, the parties on the 2nd February appear to have been heard on the merits of the exception, *without any objection on either side*; and under these circumstances, I think the defendant must be considered as having abandoned his application for a *commission rogatoire*.

That he should have done so, does not appear to me surprising; for from the nature of the case, and of the evidence, it seems more than probable that the suing out of a commission, could have had no other effect than to cause some delay, at great cost to the defendant.

Passing now to the other grounds of complaint urged by the defendant, namely—first, that the learned judge who presided at the *enquête*, rejected the defendant's motion of the 9th of January, praying that the witnesses not under examination should be required to leave the Court room, and 2nd, that the judgment upon the merits of the exception was not rendered by the same judge who heard the witnesses give their evidence; as to the second of these objections it is obviously desirable that, in the Court below, when practicable, the judgment should be rendered by the judge who hears the evidence. Owing however to the nature of the duties which devolve upon the judges of the Superior Court, and to the number of Courts they have to hold, as well where they reside, as on circuit, a strict adherence to the above rule would in many cases be attended with vexatious delays and much additional expense. The legislature have in consequence left this matter to the discretion of the judges holding the Superior Court; and with the exercise of the discretionary power thus given we cannot interfere. (1) In like manner the granting of an order that all the witnesses shall withdraw

(1) See as to exercise of discretionary powers. 5, L. C. R. p. 38.

except the one under examination, is not, according to the weight of authority, demandable of strict right. (2)

It is true that such an order is rarely refused ; but there may be circumstances rendering it inexpedient, or even impossible, to make such an order ; and such circumstances may exist without the possibility of their appearing upon the record. This Court therefore cannot say whether there were, or were not, circumstances, in the particular case before us, to justify the learned judge in refusing to make an order for the withdrawal of the witnesses not under examination. Upon the whole, although the case is not free from difficulty, I think the judgment of the Court below ought to be confirmed.

GUGY, for appellant.

DUGGAN, W. E., for respondent.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 1925.	{	QUEBEC BUILDING SOCIETY..... <i>Plaintiffs.</i>
		vs.
		JONES, <i>et al.</i> <i>Defendants.</i>
		and
		DIVERS..... <i>Opposants.</i>

Held :—That an *adjudicataire* claiming a reduction of the price of his adjudication, by reason of a *défaut de contenance*, must proceed by petition and not by opposition ; and he must give notice of his proceedings to all the parties in the cause.

Jugé :—Qu'un adjudicataire réclamant une réduction de son prix d'adjudication, en raison d'un défaut de contenance, doit procéder par voie de requête et non par voie d'opposition ; et il doit donner avis de ses procédures à toutes les parties dans la cause.

Judgment rendered the 4th day of February, 1861.

STUART, Justice.—The plaintiffs file an *opposition afin de conserver* alleging that on the 4th April, 1860, they became purchasers at the sale in the present cause of a certain water lot of which they give the description at length (which

(2) See Taylor on Ev., vol. 2 No. 1759.

description after mentioning bounds declares the contents of the lot to be 9560 feet) for the sum of £275. That they have had the lot measured since their purchase of it, and that it contains 5972 feet, shewing a deficiency of 3587 feet, for which they are entitled to a diminution of price to the extent of £103 3 11, and concluding to be collocated, in preference to all other creditors, by privilege, for the said sum of £103 3 11, upon the price of the said lot.

The Hon. R. Jones, a mortgage creditor of the defendant, contests this claim of the plaintiffs by means of a perpetual exception, to which the plaintiffs reply specially, and he also files, a *défense au fonds en droit* to the opposition, there is likewise a *défense au fonds en droit* to the special answers.

The hearing in the present cause is upon both *défenses au fonds en droit*.

To commence with the *défense au fonds en droit* to the opposition of the plaintiffs.

For all the purposes of the present argument it must be taken as admitted that the deficiency of contents alleged in the opposition of the plaintiffs exists, then the following questions are submitted.

10. Whether the property sold was not described by certain known boundaries, and as a thing certain, or whether it was described as containing a given quantity.

20. Whether the opposants being also plaintiffs, are not *garants* of the description of the property in question ; and whether they are admissible to complain of their own act, and entitled to be relieved from its consequences.

30. Whether the claim of the adjudicataire for a diminution of the price can be urged by an *opposition afin de conserver*, as done in the present instance.

The view taken by the Court upon the last of these questions renders it unnecessary to enter upon the consideration of the other two.

As too often occurs in our law there is singularly little to be found in the authors of a purely practical kind upon a question that must so frequently occur as that of an application by a purchaser for a diminution of price, and the Court is driven to refer to general principles to guide it upon the decision of a point that should be one of practice well established.

The leading authority upon this subject is to be found in 2 Henrys, p. 551, the judgment there given *in extenso* upon an application by an *adjudicataire* for diminution of price, "*La Cour faisant droit sur les requêtes et demandes,*" and shewing the proceeding there to have been by petition, the Court entertains no doubt that that is the true and only course, the question to be decided presents itself for the first time; the practice of filing oppositions is of comparatively recent date, and in no instance was there any objection taken to that course. It is obvious that all the parties in the cause ought to be notified by the *adjudicataire* that he is desirous of having a diminution of his price, and there is nothing to prevent his asking to be refunded such diminution out of his own monies; in the case in Henrys the Court ordered a given amount to be paid to the petitioner out of the monies paid by him.

The opposition is a remedy given to the creditor of the defendant and confined to him; by filing such an opposition the creditor sanctions the sale and cannot afterwards be admitted to contest it, it therefore cannot be the remedy of a person whose object it is to modify the sale. In this case the Quebec Building Society is permitted by the judgment to recommence their proceedings for a diminution of the price, if they should be advised to do so.

TESSIER and ROSS, for Building Society.

STUART and MURPHY, for R. Jones.

Authorities:—

2 Henrys, p. 551, et seq.:—1 Rep. Jur. p. 160, vbo. *Adjudicataire*:—Dico. de Dr., vbo. *Adjudicataire*, p. 44:—1 Pigeau, p. 238:—Pothier, *Vente*, No. 258:—Pothier, *Pro. Civ.*, p. 250, et seq., and p. 233.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 18. { THE CANADA LEAD MINE COMPANY, *Plaintiffs.*
 vs.
 WALKER, *et al.* *Defendants.*
 and
 STEIVEN, *Opposant.*

Held :—That a partner, after dissolution, cannot confess judgment in an action brought against the late copartnership, and that judgment entered up upon such confession will be set aside upon opposition *afin d'annuler.*

Semble :—That, even if the copartnership had still subsisted, it is doubtful if one partner could give a confession of judgment for both.

Jugé :—Qu'un associé, après dissolution, ne peut confesser jugement sur une action portée contre la ci-devant société, et que jugement rendu sur telle confession sera mis de côté sur opposition *afin d'annuler.*

Il semble :—Que, dans le cas même où la société eut encore subsistée, il est douteux qu'un associé puisse donner une confession de jugement pour les deux.

Judgment rendered the 4th February, 1861.

STUART, Justice.—The defendants had been copartners as plumbers at Quebec, from the 1st September, 1855, to 1st September, 1860, under articles of partnership produced in the cause.

On the 12th September, 1860, the plaintiffs issued a writ of summons against the defendants as partners, alleged to be carrying on business under the name of John Walker & Co., to appear in this Court on the 24th September. The declaration set forth a promissory note of the defendants in favor of the plaintiffs for \$560, over due.

On the 12th of September, Messrs Prendergast & Panet filed an appearance for the defendants in the prothonotary's office. On the same day a confession of judgment, in the following words, was likewise filed in the prothonotary's office, which the plaintiffs forthwith accepted :—" The defendants in this cause confess judgment, jointly and severally, " in favor of the plaintiffs, for the sum of \$560; with interest " and costs.

" JOHN WALKER & Co.,
 " per JOHN WALKER.

" PRENDERGAST & PANET,
 " for the defendants.

" Quebec, 12th September, 1860."

On the 15th September, three days after the issuing and service of the writ of summons, and nine days before the return day, the prothonotary entered up a judgment against the defendants, jointly and severally, upon the confession of judgment filed in the cause.

On the 15th of September, the day of the rendering of the judgment, a præcipe for a writ of *feri facias* was fyled by the plaintiffs, accompanied by a consent signed "John Walker & Co.," and countersigned by Messrs Prendergast & Panet, that execution should issue, and execution issued against the defendants.

John Steiven, one of the defendants, filed an *opposition afin d'annuler*, praying that the judgment rendered in the said cause, and all the proceedings had thereupon, might be set aside and declared null and void; because the partnership between the defendants had expired before the issuing of the writ in the cause, and no service of the same had been effected upon him; because he had never authorised Messrs Prendergast & Panet to appear for him; because he had not signed nor authorised any body to sign for him a confession of judgment; and because the plaintiffs were aware of the dissolution of the copartnership between the defendants.

He likewise filed a petition *en désaveu* of Messrs Prendergast & Panet. The opposant has been permitted to proceed *ex parte* upon both proceedings. The articles of copartnership produced by Steiven shew that by effluxion of time the partnership between him and Walker was dissolved on the 1st September. No copy of the writ was served upon Steiven, but there was a personal service of it upon Walker, and on the same day the appearance for both defendants and the confession of judgment were filed.

The judgment complained of was rendered by the prothonotary; that officer derives his power to render judgment in *ex parte* cases from 23 Vic., c. 5, sec. 11; 23 Vic., c. 57,

secs. 43, 44, 45, 46, 47, 48, and, upon confessions from, 12 Vic., c. 38, secs. 83, 84.

It has not been made a question whether the prothonotary could enter up a judgment before the return day of the writ, and the Court will not express any opinion on that point.

The rule of law seems to be well established that a partner has no implied authority, except so far as is necessary to carry on the business of the firm. Thence it has been decided that a partner cannot bind the firm by a submission to arbitration. (1) Even therefore if the partnership had subsisted, it may very well be doubted whether Walker could confess judgment in the way he did for both, but, under the circumstances, no doubt can exist that the whole of the proceedings are null and must be set aside, with costs against the plaintiffs. Messrs Prendergast & Panet seem to have been too confiding in Mr. Walker, and they have found themselves without a defence of any kind when their professional conduct is called in question by Steiven.

There must be judgment upon the petition *en désaveu*, awarding the conclusions taken by it, with costs against Messrs. Prendergast and Panet.—

TALBOT, for plaintiffs.

PRENDERGAST and PANET, for defendants.

CASAVULT and LANGLOIS, for Steiven.

(1) *Parsons on Contr.*, p. 167 :—*Taylor on Ev.*, pp. 613, 608.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 472.—*Ex parte* — DALLIMORE, Petitioner on writ of *Certiorari*.

Held :—That the corporation of the city of Quebec cannot make any By-Law imposing a water tax upon any of the wards within the city, until it shall be ready to furnish to the inhabitants of such ward, a continuous and abundant supply of pure and wholesome water.

Jugé :—Que la corporation de la cité de Québec ne peut faire de règlement pour imposer une taxe pour l'eau dans aucun des quartiers de la cité, avant qu'elle ne soit prête à fournir aux résidents de tel quartier, un approvisionnement régulier d'eau pure et salubre.

Judgment rendered the 4th of March, 1861.

The petitioner, Dallimore, was proceeded against in the Recorder's Court by the mayor, councillors and citizens of the city of Quebec, who claimed from him \$66.40 for his water taxes for the years 1856 to 1859 ; to this claim the petitioner pleaded that the plaintiffs had never, during the period mentioned in their accounts, supplied his house with water so as to become entitled to the payment of the water rate ; and that the plaintiffs had never been ready during the same period, nor were they then, to supply the house with water in such quantities and with such regularity as to entitle them to claim the water rate from him.

Upon this issue the following judgment was rendered.

“ Considérant qu'il a été constaté que depuis le trente avril, mil huit cent cinquante sept, jusqu'au trente avril, mil huit cent soixante, le dit défendeur a reçu chaque jour, sauf les accidents, des dits demandeurs, un approvisionnement régulier d'eau dans ses maisons mentionnées aux comptes annexés à la sommation en cette cause, pendant l'espace de deux heures, savoir : depuis cinq heures jusqu'à sept heures P. M.

“ Considérant, que depuis le premier mai, mil huit cent cinquante six, jusqu'au trente avril, mil huit cent soixante, le dit défendeur n'a fait aucune plainte aux autorités compétentes de son approvisionnement d'eau, condamne

“ le dit défendeur à payer aux dits demandeurs pour les causes mentionnées aux dits comptes et sommation, la somme de soixante et six piastres et quarante cents.”

The petitioner submitted this judgment to the revision of the Superior Court under the writ of *certiorari* issued in the cause, and in support of his petition he urged, among others, the following reasons.

Because the law regulating the water works in Quebec states positively that the water rate will not become payable before the water is ready to be supplied, and because the law itself qualifies the supply of water in the following words “ *a continued and abundant supply* of pure and wholesome water.”

Because it appears clearly on the face of the judgment itself of which the petitioner complains, that the supply of water supplied by the water works to the petitioner far from being *a continued and abundant supply*, as required by law, did not last more than two hours every day.

Because the water was not supplied to the petitioner by the water-works in such manner and in such quantities as required by law in order to make the water rate payable, and because the supply was quite insufficient for the wants of the petitioner.

Because the by-law of the Corporation of Quebec upon which the action of the mayor, the councillors and the citizens of the city of Quebec is based, is null and void in so far as the petitioner is concerned ; because when the corporation made the said by law it was not ready and prepared to supply that part of the city in which the petitioners houses are situated with water, nor has it ever since been ready so to do.

JOLY, pour le requérant.—Le requérant, S. Dallimore, a été poursuivi devant le Recorder, par la Corporation, pour le paiement de la taxe de l'eau, pour sa maison située dans la rue Ste. Geneviève, sur le Can, pendant 4 ans. Il a

plaidé paiement pour la première année, du 1er mai 1856 au 30 avril 1857, et de plus, que l'approvisionnement d'eau était insuffisant pendant les trois dernières années, depuis le 30 avril 1857 au 30 avril 1860, qu'il n'était pas continu et abondant aux termes du statut, et que le règlement en vertu duquel la corporation cherchait à prélever cette taxe était nul et illégal.

Le Recorder a décidé que le paiement de la taxe pour la première année n'avait pas été prouvé, et par le jugement le défendeur est condamné à payer le capital demandé avec intérêt et les dépens.

Quant à la première partie du jugement relativement à l'année commençant au 1er mai, 1856, et finissant le 30 avril, 1857, le requérant ne s'en plaint pas, car il n'a pas réussi à prouver le paiement, mais il ne croit pas que cela puisse empêcher que le jugement du Recorder ne soit renversé en entier. Paley, on Convictions, Part. 3, cap. 3, sec. 5, dit :
 " It seems to be understood that a conviction cannot be
 " quashed in part and stand good as to the rest, but must
 " be quashed generally."

Un *certiorari* n'est pas la même chose qu'un appel.

Maintenant, abordons la partie vitale de cette cause. Le jugement du Recorder dit que vû qu'il a été constaté que le requérant a reçu un approvisionnement régulier d'eau pendant l'espace de deux heures par jour, savoir, depuis cinq heures jusqu'à sept heures du soir, le requérant doit payer la taxe, et il est condamné en conséquence.

Quel est l'approvisionnement que la Corporation est tenue de fournir au requérant pour pouvoir lui faire payer la taxe.

Si le requérant peut établir que ce n'est pas un approvisionnement de deux heures seulement par jour, il devient évident que le Recorder a excédé ses pouvoirs en le condamnant, et que par conséquent le jugement doit être mis de côté.

La 18 Vic. Cap. 30, sec. 2, dit : Qu'il sera loisible à la Corporation aussitôt qu'elle sera prête à fournir de l'eau à la cité ou à aucune partie d'icelle, de spécifier et déclarer par un règlement que les propriétaires de maisons dans la cité, ou telle partie d'icelle dans laquelle elle est prête à fournir de l'eau, seront soumis à la taxe ou cotisation annuelle, laquelle taxe ou cotisation ne sera pas payable cependant avant que la Corporation ne soit prête à fournir de l'eau aux propriétaires ou occupants.

La 16ème Vic. Cap. 129, sec. 2, fait usage des mêmes termes.

Le requérant soutient que la Corporation n'est pas prête à fournir de l'eau aux propriétaires et occupant de maisons dans la partie de la cité dans laquelle se trouve située la maison du requérant, et qu'elle n'était pas prête à le faire lorsqu'elle a passé le règlement sur lequel la présente action est basée, que, par conséquent, la taxe n'est pas payable, et de plus, que le dit règlement est illégal et sans force.

Il s'agit maintenant d'établir comment l'eau doit être fournie par la Corporation pour lui donner le droit de faire payer la taxe.

Nous trouvons, dans la version anglaise de la 10 Vic. (1846) Cap. 113, sec. 11, l'approvisionnement d'eau décrit comme suit : " a continued and abundant supply of pure and wholesome water."

La version française remplace le mot " continued " par celui de régulier, mais comme ce statut a été rédigé d'abord en anglais, et ensuite traduit en français, nous devons adopter pour son interprétation la rédaction en anglais.

La Corporation en fournissant l'eau pendant deux heures par jour, donne-t-elle un approvisionnement continu et abondant ? Il n'y a qu'à lire le préambule du statut, pour voir quelle était l'intention de la législature ; elle a voulu

assurer aux citoyens de Québec un approvisionnement plus abondant et à meilleur marché que celui qu'ils recevaient des porteurs d'eau, et surtout un approvisionnement continu en cas d'incendie, ce dernier cas est spécialement prévu par le statut. Les incendies n'éclatent pas toujours entre cinq et sept heures du soir. Mais il serait futile de prolonger cette discussion, il est évident qu'un approvisionnement de deux heures par jour n'est ni continu ni abondant.

Il y a encore un autre point de vue sous lequel l'on doit envisager cette question. La Corporation n'allègue pas un contrat, dans lequel le consentement des deux parties produit l'obligation, c'est le montant d'une taxe qu'elle réclame; c'est la loi seule qui produit l'obligation que la Corporation dit avoir été contractée par le requérant. (1) Il faut donc suivre la loi rigoureusement, puisqu'elle est la source de l'obligation du requérant, si cette obligation existe. La loi qui impose au propriétaire l'obligation de payer la taxe de l'eau dit aussi que cette taxe ne sera pas payable avant que la Corporation ne soit prête à fournir l'eau. Il y a là une condition suspensive, et qui plus est, une condition *indivisible*, comme le sont les conditions suspensives. Pothier, Obligations, No. 215 dit: "L'accomplissement des conditions est indivisible, même quand ce qui fait l'objet de la condition est quelque chose de divisible." La Corporation ne peut donc pas réclamer du requérant le montant de la taxe avant de lui avoir fourni, *en entier*, l'approvisionnement auquel il a droit; tant que l'approvisionnement n'est pas complet, la taxe n'est pas plus exigible que s'il n'avait pas été fourni une seule goutte d'eau.

Que la Corporation fournisse l'eau au requérant, ainsi qu'elle est tenue de le faire avant que de pouvoir réclamer la taxe, et le requérant paiera cette taxe.

(1) Pothier, Obligations, No. 144.

BAILLARGÉ, pour la Corporation :—Le jugement rendu en faveur de la Corporation en Cour Inférieure est fondé sur ce que les mots *approvisionnement régulier et abondant* contenus dans la version française de la 10 Vic., Chap. 113, sec. 11, ne signifient pas et ne veulent pas dire que la Corporation sera tenue de fournir de l'eau aux citoyens de Québec d'heure en heure, et de minute en minute, et jour et nuit sans discontinuation aucune, mais seulement qu'elle sera tenue de fournir l'eau *régulièrement* tous les jours à des heures fixes, et en quantité suffisante pour les besoins de la famille du requérant.

L'eau a été fournie au requérant *régulièrement* tous les jours à des heures fixes, et en quantité abondante et plus que suffisante pour les besoins de la famille du requérant, et partant le jugement du Recorder doit être confirmé.

Le jugement est comme suit :—

“ Considérant, que par les divers statuts de cette province permettant à la Corporation du maire et des conseillers et citoyens de la cité de Québec, de prélever sur cette cité, en aucun quartier d'icelle, une taxe pour la fourniture de l'eau, et notamment par le statut passé dans la dixième année du règne de Sa Majesté la Reine Victoria, chapitre 113, intitulé acte pour approvisionner d'eau la cité de Québec et ses environs, il est ordonné que la dite Corporation devra faire des règlements pour assurer à la cité de Québec un approvisionnement d'eau abondant et continu, et que la dite Corporation ne pourra faire de règlement pour prélever aucune taxe pour l'eau, avant que la dite Corporation ne soit en position de fournir cette eau, d'une manière abondante et continue, à la dite cité, ou à aucun de ses quartiers : Considérant que la sentence du Recorder de cette cité, en date du neuf juillet, mil huit cent soixante, condamnant le requérant, Samuel Dallimore, à payer à la dite Corporation la somme de soixante et six piastres et quarante centins, pour la taxe de l'eau, constate que le dit

Samuel Dallimore n'a eu un approvisionnement d'eau que pendant deux heures par jour, depuis le trente avril, mil huit cent cinquante sept, jusqu'au trente avril, mil huit cent soixante, et qu'en cela la dite sentence est fautive en ce que la dite Corporation ne pouvait soumettre la cité de Québec, ou aucun de ses quartiers, à une taxe de l'eau à moins d'être en position de la ou de les approvisionner d'eau en la manière susdite, et ne pouvait exiger du dit Samuel Dallimore la taxe de l'eau : Considérant que la dite sentence est fondée sur un règlement illégal, et est en conséquence contraire à la loi, et que le Recorder en la rendant a outrepassé sa juridiction : Considérant que la dite sentence ne peut être modifiée par cette Cour, et, qu'au contraire, elle doit être déclarée mauvaise et illégale en son entier, malgré que pour une partie elle serait fondée en loi ; la Cour casse et annule la dite sentence dont se plaint le dit Samuel Dallimore, rendue par le Recorder de cette cité de Québec le neuf juillet dernier.

JOLY, for petitioner.

BAILLARGÉ, for Corporation.'

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 19. { MATTE *Appelant.*
 et
 { BROWN *Intimé.*

Jugé :—1o. Que sur conviction par un juge de paix sous "L'acte des municipalités et des chemins du Bas-Canada de 1855," il doit apparaître, 1o. Que le juge de paix avait juridiction. 2o. Que le chemin duquel il s'agit est un chemin de front ou une route, et qu'il y a ou qu'il n'y a pas procès-verbal.

2o. Que la conviction sera déclarée nulle si le défendeur est poursuivi par rapport à un chemin, et s'il appert qu'il est condamné pour un pont.

3o. Que tout pont au dessus de dix pieds est pont public.

4o. Que sous le dit acte un juge de paix n'a pas juridiction lorsqu'il s'agit d'une somme d'argent dépensée par un officier des chemins pour réparations ; sa juridiction ne s'étendant qu'aux cas où il s'agit d'amendes ou pénalités. (1)

Held :—That upon conviction by a justice of the peace under "The Lower-Canada municipal and road act of 1855," it must appear, 1o. That the justice of the peace had jurisdiction. 2o. Whether the road in question was a front road or a by road, and whether there was or was not a *procès-verbal*.

2o. That the conviction will be quashed if the defendant is complained of in relation to a road and is convicted by reason of a bridge.

3o. That bridges above ten feet are public bridges.

4o. That under the said act a justice of the peace has no jurisdiction in a case for money laid out and expended for repairs ; his jurisdiction only extending to cases for the recovery of fines or penalties.

Jugement rendu le 21^{me} jour de mai, 1861.

L'appelant, au mois de septembre mil huit cent soixante, fut poursuivi par l'intimé, en sa qualité d'inspecteur de chemins, pour avoir négligé de réparer sa part d'un certain chemin indiqué dans la plainte, et qui se trouvait sur le chemin de St. Joseph à Laval, et que l'intimé avait été forcé par la loi à faire faire les travaux auxquels le dit appellant était obligé, et dont le cout se montait à £1 5 3. Sur cette poursuite l'appelant fut condamné par Jean-Baptiste Parant, écuyer, un des juges de paix pour le district de Québec, devant lequel la poursuite avait été intentée, à payer à l'intimé la dite somme de £1 5 3, avec £4 9 0 de frais.

De ce jugement l'appelant interjeta appel, se plaignant du jugement pour, entre autres, les raisons suivantes ; parceque l'appelant était poursuivi pour avoir négligé de

(1) Quoique le jugement ne fasse pas mention de ce moyen de nullité invoqué par l'appelant, néanmoins la décision sur ce point a été formelle.

réparer une partie de chemin ; parcequ'il était condamné à payer pour réparation d'un pont ; parceque le dit pont avait plus de dix pieds et partant était un pont public ; parcequ'il n'apparaissait pas que le chemin ou le pont fussent dans le comté ou dans le district de Québec, (1) parceque le délai entre le service et le rapport était insuffisant, (2) parceque le juge de paix n'avait aucune juridiction pour adjuger dans une action pour dette ou pour argent dépensé par l'intimé pour l'usage de l'appelant. (3)

TASCHEREAU, Juge :—Tous les moyens invoqués par l'appelant pour faire déclarer la nullité de la sentence prononcée contre lui en cette cause sont valides, à l'exception de celui par lequel il se plaint que le délai entre le service de la plainte et le jour du rapport est insuffisant, lequel ne peut valoir, en autant que le défendeur n'en a pas fait un moyen d'exception devant le juge de paix, sa comparution, sans réserve, a eu l'effet de faire disparaître cette irrégularité—Nul doute que le juge de paix agissant en vertu des dispositions de l'acte des chemins et des municipalités de 1855, n'a juridiction que dans les cas où il s'agit d'amendes—les provisions de cet acte à ce sujet se trouvent reproduites au Chap. 24, sec. 63, des Statuts Refondus cités à l'audience.

Le jugement est comme suit :—

“ Considérant que Jean Parant, écuyer, se disant juge de paix de Sa Majesté pour le comté de Québec, et qui a prononcé la sentence dont il est appel en cette cause, ne constate pas qu'il eut juridiction en cette cause, savoir : que le chemin dont il est question, et pour la réparation duquel l'appelant est poursuivi, fût dans les limites de sa juridiction, c'est-à-dire dans les limites de la municipalité du dit Jean Parant, ou de la municipalité voisine ; considérant de plus que la dite sentence ne constate pas que le

(1) *Paley on Convictions*, pp. 147, 157 :—13 *East* p. 139 :—14 *East*, pp. 411 to 414.

(2) *Statuts Refondus*, Cap. 24, 6 sous section, 63 section.

(3) *Statuts Refondus*, Cap. 24, sec. 63.

chemin du dit appelant soit un chemin de route, et qu'il n'est ni allégué ni prouvé que le dit chemin fut verbalisé, que la description du dit chemin est irrégulière et insuffisante en loi ; considérant de plus que le dit Jean Parant a condamné l'appelant, non pour le défaut de réparer son chemin, mais bien un pont, et que le dit pont est de plus de dix pieds de long, et en autant est un pont public, et dont l'entretien doit être réglé par un procès verbal dont il n'y a ni allégué ni preuve en cette cause, déclare la sentence prononcée le neuvième jour d'octobre dernier, par le dit Jean Parant, contre le présent appelant en faveur de l'intimé, injuste et illégale, et l'annule et casse, et renvoie l'action du dit intimé, avec dépens, tant ceux encourus devant cette Cour, que ceux encourus devant le dit Jean Parant."

SUZOR, pour l'appelant.

CASALT et LANGLOIS, pour l'intimé.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—STUART, Juge.

No. 1918. { *HAMEL et al.* Demandeurs.
vs.
COTÉ et al. Défendeurs.

Jugé :—Que dans un affidavit pour un writ de *capias ad respondendum* contre un commerçant, il est nécessaire d'alléguer, 1o. l'insolvabilité du débiteur, 2o. que tel débiteur, étant insolvable, refuse de faire cession de ses biens en faveur et pour l'avantage de ses créanciers.

Held :—That in an affidavit for a writ of *capias ad respondendum* against a trader, it is necessary to allege, 1o. the insolvency of the debtor, 2o. that such debtor, being insolvent, refuses to make assignment of his effects in favor and for the advantage of his creditors.

Jugement rendu le 4me jour d'octobre, 1861.

Cette action fut commencée le 14me jour de septembre, 1861, par l'émanation d'un writ de *capias ad respondendum*, dirigé contre Côté seulement, l'un des défendeurs.

Ce writ fut émané sur l'affidavit de Joseph Hamel, un des demandeurs ; cet affidavit, après avoir énoncé les causes pour lesquelles les défendeurs étaient endettés envers les demandeurs, procède comme suit : “ Que le déposant a raison de croire, et croit véritablement, que les défendeurs ont caché leurs biens et effets avec l'intention de frauder les dits demandeurs, et leurs autres créanciers, et que, sans le bénéfice d'un writ de *capias ad respondendum*, pour arrêter la personne de Majorique Côté, l'un d'eux, les dits demandeurs perdront leur recours, et souffriront des dommages ; que les raisons qu'a le dit déposant de croire ainsi sont, que le 12 avril dernier, la société des dits défendeurs, et le dit défendeur Majorique Côté, étaient insolubles et en déconfiture ; que le 14 août dernier, le dit Majorique Côté, étant alors à Québec, a offert aux dits demandeurs une cession de ses biens pour leur avantage, et celui des autres créanciers de la dite société de Majorique Côté, mais qu'avant la perfection de la dite cession le dit Majorique Côté a laissé Québec, s'est rendu à Rimouski et a continué le commerce de la dite société

Majorique Côté ; que la dite société a tout dernièrement fait des transports à quelques uns de ses créanciers, qu'elle a payé vingt chelins dans le louis à d'autres, et qu'elle a appliqué des argents provenant du commerce de la dite société, à faire des constructions sur une propriété propre de la femme du dit Majorique Côté, et que le dit Majorique Côté a enlevé une bâtisse construite sur une propriété hypothéquée en faveur des dits demandeurs."

Sur rapport de l'action en Cour il fut fait motion de la part du dit Majorique Côté pour que le *capias* émané contre lui fut annulé et mis de côté, *quashed*, et le dit Majorique Côté mis en liberté, pour, entre autres, les causes suivantes : Parceque l'insolvabilité des défendeurs telle qu'alléguée par les demandeurs dans l'affidavit de Joseph Hamel, n'était pas seule suffisante pour obtenir l'émanation du dit bref de *capias*, sans l'affirmation de leur part que malgré la dite insolvabilité les dits défendeurs refusaient de faire cession de leurs biens et effets pour l'avantage de leurs créanciers.

Parcequ'il n'appert nullement par le dit affidavit que les dits défendeurs aient en aucun temps refusé de payer les dits demandeurs, ou de leur faire une cession de leurs biens et effets.

STUART, Juge.—Dans cette cause les demandeurs ont, par l'affidavit de Joseph Hamel produit avec le *præcipe* pour le *capias*, allégué que les raisons qu'a le déposant de croire que les dits défendeurs ont caché leurs biens et effets dans l'intention de frauder les dits demandeurs, sont que la société des dits défendeurs, faisant commerce sous le nom de Majorique Côté, et le dit Majorique Côté, étaient insolubles et en déconfiture, et que le dit Majorique Côté, étant à Québec, avait offert aux dits demandeurs une cession de ses biens pour leur avantage, et celui des autres créanciers des défendeurs, mais qu'il avait laissé Québec pour Rimouski sans faire acte de la cession offerte. Le défendeur Côté a fait motion pour faire mettre de côté le *capias*, prétendant

que l'allégation d'insolvabilité seulement était insuffisante pour justifier l'émanation d'un *capias* ; qu'il était de plus nécessaire d'alléguer que nonobstant leur insolvabilité notable, le dit Côté avait refusé de faire cession de ses biens et effets pour l'avantage des demandeurs, et autres créanciers, ce que les demandeurs n'ont pas allégué dans leur dit affidavit.

Ces prétentions des défendeurs sont bien fondées, parce que les demandeurs ne disent pas que les défendeurs ont refusé de faire cession, mais bien au contraire, que Côté, étant à Québec, a offert de le faire mais a laissé Québec pour Rimouski avant de faire telle cession.

Jugement :—La Cour, vu la motion faite en cette cause le premier du courant, de la part du dit Majorique Côté pour que le *capias ad respondendum* émané en cette cause contre lui, soit annulé et mis de côté, *quashed*, et le dit Majorique Côté mis en liberté en conséquence, avec dépens, pour les causes et raisons mentionnées en la dite motion ; accorde la dite motion, et ordonne que le dit Majorique Côté soit mis en liberté tel que demandé, avec dépens.

CASALT et LANGLOIS, pour les demandeurs.

LÉGARÉ et MALOUIN, pour les défendeurs.

BANC DE LA REINE, } DISTRICT DE QUÉBEC.
 EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart., Juge-en-Chef,
 AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

LATERRIÈRE,..... *Appelant.*
 et
 HOUDE *et al.*,..... *Intimés.*

Jugé :—1o. Que le titre accordé à un adjudicataire sur vente par décret, à une époque subséquente à l'adjudication, a un effet rétroactif, et confère à l'adjudicataire le droit de propriété et tous les avantages qui en résultent, à compter du jour de l'adjudication.

2o. Que, dans l'espèce, il y avait preuve suffisante de l'usage et occupation par l'intimé de la propriété adjugée à l'appelant.

Held :—1o. That the title granted to an *adjudicataire* at sheriff's sale, at a period subsequent to the adjudication, has a retroactive effect, and confers upon such *adjudicataire* the right of property and all the advantages resulting from it, from the day of the adjudication.

2o That, in the case submitted, there was sufficient proof of the use and occupation by the respondent of the property adjudicated to the appellant.

Jugement rendu le 8me jour de mai, 1861.

Sir L. H. LaFontaine, Bt., Juge-en-Chef.—Action pour loyer à raison de l'occupation, par la défenderesse, femme séparée de biens, d'une propriété dont le demandeur s'était, le 30 mai, 1859, rendu adjudicataire au décret pratiqué sur le mari de la défenderesse.

Le mari étant devenu insolvable, sa femme obtint un jugement en séparation de biens en 1858.

Le décret avait été poursuivi par le présent demandeur, qui, étant créancier privilégié, avait fourni caution suivant la loi, et plus tard il obtint titre du shérif. Ainsi, sous tous les rapports, son titre d'acquisition doit être censé valoir comme au 30 mai, 1859.

Dans sa déclaration, le demandeur allègue que la défenderesse a occupé, du 30 mai au 1er septembre, 1858, et que la valeur du loyer pour cet espace de temps est de £30. C'est la somme qu'il demande par ses conclusions.

Une défense au fonds en droit, présentée par la défen-

(1) 4 Jurist, p. 1, Harwood and Shaw.

deresse, ayant été déboutée, le demandeur a procédé à l'enquête *ex parte*. Puis est intervenu, le 21 août 1860; le jugement dont est appel; il déboute le demandeur de son action, "considering," est-il dit, "that the defendant, Mrs. Verret, denies upon oath that she occupied the plaintiff's house during the time for which she is sued in the present cause, and that the rest of the testimony in the cause speaks of Alexis Verret as occupying the same."

Y-a-t-il là une appréciation exacte de la preuve? Je ne le crois pas.

Dans le mois de janvier 1859, le fonds de commerce, les outils, les matériaux et les voitures de Verret, (qui s'appelle Ambroise, et non Alexis,) avaient été vendus judiciairement, et achetés par la défenderesse en sa qualité de femme séparée de biens.

Interrogée sur faits et articles, au 3e interrogatoire: "N'est-il pas vrai que le dit Ambroise Verret a continué, après la dite vente judiciaire, à exercer son métier et industrie de carrossier sur la dite propriété et dépendances, et ce, au nom et pour le profit et avantage de la dite Théotiste Houde, comme séparée de bien d'avec lui, et ce, à sa connaissance et de son consentement?" la défenderesse répond: "jusqu'au 31 de mai de l'année dernière" (1859); et dans sa réponse au 4e interrogatoire, elle dit: "Mais depuis cette époque, je ne sais au nom de qui il l'a exercé, ni au profit de qui, et je ne sais même pas s'il s'est servi de *mes* matériaux *qui étaient dans la maison*."

Question.—5o. N'est-il pas vrai que la dite Théotiste Houde a occupé et fait occuper la dite propriété pour les fins de son commerce et pour le dépôt de ses voitures, outils et matériaux, depuis le mois de janvier de l'année dernière, jusqu'au premier de septembre dernier; si non, dites pendant quel temps et quand ses voitures, matériaux et outils ont été totalement enlevés de dessus la dite propriété?

Réponse.—Les effets ont été enlevés le dix du mois d'août dernier. Je ne puis dire s'il y avait alors des voitures dans la maison, mais il y avait encore des outils et des matériaux m'appartenant.

La réponse de la défenderesse au 4e interrogatoire n'était pas sincère. Quant au 5e elle évite de répondre à la première partie ; ainsi cette partie doit être prise pour confessée et avérée, et par conséquent fait preuve complète contre elle au profit du demandeur, jointe à cela sa réponse à la 2e partie de l'interrogation.

Elle a de plus expressément admis que jusqu'au 31 mai, tout allait en son nom, et deux témoins, Gingras et Mathieu, déclarent " qu'il n'y a pas eu de différence dans la manière que se sont faites les affaires de charron sur la dite propriété avant et après le 31 mai dernier." S'il n'y a pas eu de différence connue, avant le 31 mai, les affaires se faisaient au nom de la défenderesse, et cela de son propre aveu, il faut dire qu'après le 31 mai, les affaires ont continué d'être conduites en son nom.

Enfin, tout bien considéré, il me semble établi que la défenderesse qui était séparée de biens d'avec son mari a eu, en son propre nom comme telle, possession des lieux jusqu'au 10 ou 15 août, 1859.

Regardant la valeur du loyer comme étant de £30 par année, je donnerais jugement au second pour £15 11 1 eourant, (2 mois et 10 jours de loyer, du 31 mai au 10 août 1859.)

MONDELET, Juge.—Action par le propriétaire, pour occupation par la défenderesse, séparée de biens de son mari, d'une maison appartenant à l'appelant.

Défense en droit (mal fondée) ayant été déboutée, et les défendeurs n'ayant pas plaidé à l'action, le demandeur a procédé *ex parte*.

Par la preuve et par les réponses aux interrogatoires sur faits et articles de la défenderesse, (surtout son refus ou son

abstention plutôt de répondre à la 1ère partie du 5e interrogatoire) la preuve du fait est complète. Ainsi je ne vois aucune difficulté : le jugement de la Cour de 1ère instance doit être infirmé, et il doit y avoir jugement en faveur du dit appelant pour £30.

L'on a prétendu que l'identité de la propriété décrite dans le titre du demandeur avec celle décrite en la déclaration n'est pas établie.

Cette objection, à mon avis, serait insurmontable si la défenderesse elle même n'avait pas, par ses réponses aux interrogatoires sur faits et articles, mis cette identité hors de tout doute.

Jugement — Considérant que le demandeur, appelant, s'est, le 30 mai, 1859, rendu adjudicataire au décret pratiqué sur le mari de la défenderesse, intimée, de la propriété dont il s'agit en cette cause, qu'ayant fourni caution, suivi la loi, et ensuite obtenu titre du shérif, ce titre doit être censé valoir comme du dit jour, 30 mai, 1859.

Considérant qu'il est établi en fait que la dite défenderesse intimée a eu l'occupation de la dite propriété pour son propre profit depuis le dit jour, 30 mai, 1859, jusqu'au 10me jour d'août suivant, et que dans le jugement dont est appel, qui énonce le contraire, il a été fait une appréciation inexacte de la preuve, et que par conséquent il y a eu mal jugé ; infirme le susdit jugement, savoir : le jugement rendu le 21e jour d'avril, 1860, par la Cour de Circuit, et cette Cour condamne la dite défenderesse intimée, à payer à l'appelant, pour les cause énoncées en la déclaration en cette cause, la somme de £15 11 1 avec intérêts, etc.

CASALT et LANGLOIS, pour l'appelant.

LARUE, pour l'intimée.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 142.—*Ex parte*—LANE, *Petitioner for Certiorari*.

Held :—That the beaches of the north shore of the river St. Lawrence are now vested in the Quebec Harbour Commissioners, and that they alone have the control and management of the same, as also the right of punishing any person who may encroach upon, or encumber, them, and that the Trinity-House act, in so far as it conferred any powers of control and management over those beaches, is repealed by implication.

Jugé :—Que les grèves de la rive nord du fleuve St. Laurent sont maintenant possédées par les Commissaires du Hâvre de Québec, et qu'ils ont seuls le contrôle et l'administration de ces grèves, comme aussi le droit de punir toute personne qui empiète sur, ou embarrasse les dites grèves, et que l'acte de la maison de la Trinité, en autant qu'il conférait aucun pouvoir de contrôle et d'administration sur ces grèves, est rappelé par implication.

Judgment rendered the 8th day of July, 1861.

This was a writ of *certiorari* to remove the proceedings had before the Trinity-House of Quebec where a judgment had been rendered on the 30th of November, 1860, condemning the defendant to pay a fine of £10 cy. and costs of suit.

The charge against Lane was for having infringed the 41st By-Law of the Trinity-House.

The defence set up was ; 1o that the Trinity-House had no jurisdiction ; 2o that the offence complained of had been already tried, *chose jugée* ; 3o that the defendant had not encumbered the passage in the manner complained of, and that he occupied the premises under lease from the provincial government ; which lease, as well as a plan of the premises, was filed by the defendant.

It was proved by the plaintiff that the offence charged against the defendant had been committed, and as no evidence to the contrary was produced, judgment was rendered against the petitioner, Lane.

It was argued before the Superior Court, on behalf of the defendant, that the Trinity-House of Quebec had ceased to have jurisdiction in the premises, that the 22 Vict., cap. 32, creating the Quebec Harbour Commissioners had vested in that body the jurisdiction theretofore vested in the Trinity-

House, and that the beaches in the Harbour of Quebec were the property of the Harbour Commissioners, and consequently under their control. It was also pretended that the judgment against Lane was excessive, inasmuch as the by-law limited the fine to £10 cy., and the judgment was for £10 and costs.

On the part of the plaintiff it was said that although by the 22 Vict., cap. 32, the beaches on the north side of the Harbour of Quebec had been vested in the Quebec Harbour Commissioners, it was not, from that, to be inferred that the jurisdiction heretofore exercised by the Trinity-House had been taken from that body; that the Harbour Commissioners were a body appointed for a special purpose, and that to carry out the object for which they were created, certain property, before the passing of the act belonging to the Crown, was vested in them, but that so far as the Trinity-House was concerned, they, the Harbour Commissioners, must be looked upon as a private individual subject to the rules and by-laws laid down by the Trinity-House, which was a body exercising more general and more public powers than the Quebec Harbour Commissioners, and that in fact the Harbour Commissioners were no better than individual proprietors or occupants, and subject to the Trinity-House for the infringement of the by-laws of that board concerning the beaches generally.

The attention of the Court was also drawn to the 27th section of the 22 Vict., cap. 32, which section preserves intact the rights of all bodies which existed at the time of the passing of the said act.

STUART, Justice.—In execution of the very general powers of making by-laws, “for the improvement and management of the Harbour of Quebec,” conferred upon the Trinity-House of Quebec by the 12 Vict. cap. 114, the Trinity-House passed the 41st by-law, which is in the following terms :

“ That any person or persons who shall obstruct any of
 “ the landing places within the Harbour of Quebec, or who
 “ shall incumber any part of the space between high and
 “ low water marks of the several beaches within the said
 “ harbour, with timber, masts, logs or rafts, so as to pre-
 “ vent a free, continuous and uninterrupted passage and
 “ communication from the several streets and lanes of the
 “ city of Quebec, leading towards the rivers St. Lawrence
 “ and St. Charles, over the beaches of the same, down to
 “ low water mark, to the full breadth of every such street
 “ or lane, respectively, shall incur and pay a penalty not
 “ exceeding ten pounds currency.”

It is for a breach of this by-law that Lane was brought before the Trinity-House and fined £10. The conviction is manifestly right if the Trinity-House continues to have jurisdiction over the subject matter.

By the 22 Vict., cap. 32, intituled: “ An act to provide for the improvement and management of the Harbour of Quebec,” a corporation by the name of “ Quebec Harbour Commissioners ” is created, with power to make by-laws, and to impose penalties under the same, not exceeding twenty dollars, or sixty days imprisonment, against all persons who may infringe the same, among other purposes for the prevention of injury to the property of the Corporation, *and encroachment and incumbrances thereon, and the removal of the same.* Now, the 2nd sec. of this act vests in this corporation: “ All land below the line of high water on the north side of the River St. Lawrence,” within limits including those in question in this cause, then belonging to Her Majesty. Lane produces a lease from the Commissioner of Crown Lands, as the title by which he occupies the space complained of, leaving no doubt of the fact of the property in question being now vested in the Harbour Commissioners.

The question as limited by the case under consideration is whether the Statute 12 Vict., cap. 114, is repealed by

the 23 Vict., cap. 32, in so far as the beaches on the north side of the St. Lawrence are concerned.

The power of the Trinity-House to pass the by-law for the violation of which Lane has been convicted has not been called in question, and the power of preventing the beaches from being encumbered would appear to be incident to the very general powers of the Trinity-House to make by-laws "for the improvement and management of "the Harbour of Quebec." Whether the improvement and management of the Harbour of Quebec can be vested in two separate corporations at the same time, or whether the passing of the last act for that purpose is a repeal of the first—*leges posteriores priores contraries abrogant*—is not the large question to be decided in this case, but the much more limited question whether the beaches are not now vested in the Quebec Harbour Commissioners, in whom alone reside the power of punishing any person who may encroach upon or encumber them.

The power of the Trinity-House over the beaches on the north side of the St. Lawrence was merely of management, they continued to be vested in the crown, whereas now, all land below the line of high water on the north side of the River St. Lawrence is vested in the Quebec Harbour Commissioners. Incident to the right of property they must be held to have the control and management, but the act itself puts this beyond doubt by providing that the Quebec Harbour Commissioners may make by-laws for: "The prevention of "injury to the property of the Corporation, and encroachment "and encumbrances thereon, and the removal of the same." It is therefore the opinion of the Court that in so far as the beaches of the north side of the river St. Lawrence are concerned, the same are now vested in the Quebec Harbour Commissioners, and that they alone have the management and control of the same, and that the Trinity-House act in so far as it conferred any powers of control and management over those beaches, is repealed by implication. It is desi-

nable that it should be distinctly understood that this decision does not go beyond the question raised in this cause.

DUGGAN and DUGGAN, for petitioner.

ALLEYN, R. for respondent.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 1197. — *Ex parte* — BOURDAGES, *Requérant pour Certiorari*.

Jugé :—1o. Que les étudiants dans les écoles publiques sont exempts de la taxe de capitation, et que la corporation de la cité de Québec a seulement le pouvoir d'étendre cette exemption à d'autres classes de citoyens, sans pouvoir priver tels étudiants de l'avantage de telle exemption.

2o. Que la corporation a le droit d'augmenter cette taxe d'un écu à une piastre.

3o. Que l'Université-Laval est une école publique, et, comme telle, donne droit à ses étudiants aux privilèges et immunités accordés aux étudiants d'écoles publiques.

4o. Qu'un étudiant en droit à l'Université-Laval, et en même temps sous brevet à un avocat, ne peut être privé de ses privilèges et immunités comme étudiant dans une école publique.

Held :—1o. That students in public schools are exempt from the capitation tax, and that the corporation of the city of Québec have simply the power to extend this exemption to other classes of the citizens, but not to deprive such students of its benefit.

2o. That the corporation has the right to increase the capitation tax from 2s. 6d. to 5s.

3o. That the Laval University is a public school, and, as such, entitles its students to all the immunities and privileges granted to students in public schools.

4o. That a law student studying at the University, and also under indentures to an advocate, cannot be deprived of his privileges and immunities as a student in a public school.

Jugement rendu le 2 novembre, 1861.

TASCHEREAU, Juge :—Le requérant, Gaspard Bourdages, de la cité de Québec, étudiant, se plaint, par sa requête en demande d'un bref de *certiorari*, d'avoir été condamné, le 28 janvier, 1861, par le recorder de cette cité, au tribunal duquel il a été cité sur demande du maire, des conseillers et citoyens de Québec, à payer la somme d'une piastre de capitation pour l'année mil huit cent soixante. Il allègue et plaide exemption de cette capitation au moyen de son titre d'élève depuis plus de deux ans d'une école publique, savoir : de l'Université Laval, à laquelle il donne le nom

d'école ou institution publique, tenant sa charte de la royauté même.

En consultant les diverses lois qui ont trait à la matière en litige en cette cause, on voit que par la 36 Geo. III, ch. 9, (qui est l'acte autrefois appelé communément l'acte des chemins) tout homme de l'âge de 18 ans et au-dessous de 60 ans, n'étant pas *bona fide* un apprenti ou domestique, et ne tenant pas un ou plusieurs chevaux, devait travailler, soit par lui-même ou par un substitut, aux grands chemins, ponts, rues, marchés, places publiques et ruelles en la cité de Québec, à chaque jour et à chaque lieu désignés par l'inspecteur, pendant un espace de temps n'excédant pas six jours dans chaque année. On voit aussi que cette loi a reçu une grande modification par la 39 Geo. III, ch. 5, sect. 21, et qu'aux exemptions de la capitation indiquées ci-dessus par la 36 Geo. III, la 39 Geo. III, a substitué celle en faveur des apprentis et des étudiants dans les séminaires, collèges ou écoles publiques; on voit que, plus tard, lorsque la ville de Québec a été incorporée, et que la législature eut donné à cette corporation les pouvoirs nécessaires à son fonctionnement, la 18 Vict. ch. 159, précédée de la 3 et 4 Vict. ch. 35, modifièrent et rappelèrent jusqu'à un certain point la 39 Geo. III, ch. 5, qu'il entraînait dans les pouvoirs et attributions de la corporation de faire des règlements pour imposer des taxes aux fins de produire les deniers nécessaires au soutien de l'institution, exemptant cependant de taxe toute bâtisse occupée, ou qui serait ci-après occupée et employée aux fins d'éducation, de charité ou de bienfaisance, et permettant à la corporation d'augmenter la somme de commutation du travail personnel, à un montant n'excédant pas cinq chelins pour chaque personne qui y était sujette, et exemptant du paiement de telle capitation aucune classe de personnes aux quelles la corporation jugerait convenable d'étendre cette exemption en raison de la faiblesse de leurs moyens pécuniaires.

Cet exposé de faits nous donne de suite un aperçu des questions qui s'élèvent en la cause, savoir :

1o. Si les lois qui régissent la corporation de la cité de Québec, et notamment la 18 Vict., ch. 159, ont fait disparaître les exemptions de la capitation remarquées en la 36 et 39 Geo. III, et y ont substitué une nouvelle législation.

2o. Si la corporation avait le droit d'élever de 2s. 6d. à 5s. la capitation, et s'il existe à cet égard un règlement de sa part élevant à 5s. cette capitation.

3o. Si l'Université Laval est une de ces écoles que l'on peut assimiler aux écoles publiques, dont les élèves sont par la 39 Geo. III, ci-dessus mentionnée, déclarés être exempts de la capitation.

4o. Si M. Bourdages tombe dans la catégorie des exemptions, en un mot, s'il était élève de l'Université à l'époque de l'imposition de la taxe, et pendant toute la durée de l'année pour laquelle il est poursuivi, et si sa qualité d'étudiant sous brevet chez un patron ne l'emporte pas sur celle d'élève de l'Université Laval, de manière à justifier la condamnation à la capitation susdite en une qualité autre que celle d'élève de l'Université Laval.

On a vu que l'acte de la 36 Geo. III, n'exemptait de la capitation que les apprentis ou domestiques, et ceux qui ne tiennent pas de chevaux, et que la 39 Geo. III, a à peu près rappelé la 36 Geo. III, en ce qui concerne la capitation, et a exempté de la capitation les apprentis et les étudiants dans les séminaires, collèges ou écoles publiques. Dans mon opinion cette exemption en faveur des apprentis et étudiants existe encore, et n'a nullement été rappelée, ni en aucune manière affectée, par la passation et mise en force des divers actes de la législature relatifs à l'incorporation de la cité de Québec. En effet, le seul acte qui semblerait introduire un changement, serait la 18 Vict., ch. 159, à la section 51, et en lisant attentivement cette section on se convaincra que les pouvoirs de la corporation y sont définis

quant à certaines matières, que ses droits de taxer tel et tel corps de métier y sont clairement énoncés, qu'on y trouve bien l'exemption de toute taxe en faveur des maisons d'éducation, de charité ou de bienveillance, et le droit accordé à la corporation d'augmenter le montant de la capitation payable par chaque personne assujettie aux travaux des chemins en la cité, jusqu'à la somme de cinq chelins, et d'exempter du paiement de la capitation toute classe pauvre de la société ; mais on n'y trouve pas que la corporation ait le droit de porter atteinte aux exemptions accordées aux étudiants. Au contraire, la législature nous donne à entendre que cette exemption reste intacte, puisqu'elle dit au paragraphe 3 de la section 51, que la corporation aurait le droit d'augmenter la taxe payable par chaque personne qui y est sujette, faisant comprendre par là qu'il doit y avoir une classe qui n'y soit pas soumise. Or, qu'elle peut être cette classe, si ce n'est celle des étudiants et apprentis sus-mentionnés. Et d'ailleurs la 36 et la 39 Geo. III, ne sont rappelées par la 18 Vict. ch. 159, sect. 41, qu'en ce qui concerne la nomination d'inspecteur des chemins et ses assesseurs, qui, en vertu de ce dernier acte, doit être faite par la corporation, au lieu de l'être par l'exécutif du pays. Il est donc certain que l'exemption en faveur des apprentis et des étudiants existe comme avant l'incorporation de la cité, et que la corporation n'a pu par aucun de ses règlements restreindre les exemptions, et qu'elle ne pouvait que les étendre.

La seconde question qui est celle de savoir si la corporation avait le droit d'élever la capitation de 2s. 6d. à 5s., trouve sa solution, 1o. dans la section 51 de la 18 Vict. ch. 159, qui donne ce droit en termes formels : 2o. dans le règlement que la corporation a passé en date du 10 mai 1859, élevant la capitation à la somme de 5s.

La 3e question est celle qui est relative à l'exemption des élèves de l'Université-Laval, cette question présente, suivant moi, quelque difficulté, peu sérieuse il est vrai, quoi-

qu'elle puisse donner lieu à quelque argumentation plausible.

La question est de savoir si l'Université-Laval est ou peut être assimilée à une école publique, dont nous avons vu que les élèves peuvent réclamer l'exemption de la capitation. Nous devons voir dans quel but et pour quel motif la législature a étendu aux élèves des écoles publiques, des collèges et des séminaires, l'immunité en question : nul doute qu'elle avait en vue la faveur et les privilèges que tous les pays civilisés accordent aux maisons d'éducation, et à l'éducation elle-même. Si donc on a bien voulu accorder l'exemption en faveur d'une maison où on enseignait qu'une seule branche d'éducation, ne peut-on pas dire, qu'à plus forte raison on a dû vouloir étendre cette exemption à la maison où on ne se borne pas à enseigner la grammaire, l'écriture et l'arithmétique, mais dans laquelle on enseigne les arts et les facultés. Il n'y aurait donc pas de raisons logiques d'exclure de l'immunité les élèves d'une telle institution. Mais, après tout, qu'est-ce qu'un collège et un séminaire, qu'est-ce qu'une école publique, qu'est-ce qu'une Université ? Tous les dictionnaires s'accordent à dire qu'un collège est un établissement public où l'on enseigne les lettres, les sciences, etc., etc. Qu'un séminaire est un lieu généralement destiné pour élever et instruire des ecclésiastiques ; qu'une école publique est un lieu où l'on enseigne les belles lettres et les sciences, et qu'une université est un établissement composé de professeurs et d'*écoliers* établis par autorité publique pour enseigner et apprendre les sciences et les arts. Après ces définitions et ces explications ne peut on pas dire qu'une université est non seulement une école, mais une école où l'on enseigne tous ce qui s'enseigne, et dans les collèges et dans les séminaires et dans toute autre école publique, et qu'en un mot, dire université, c'est dire la réunion de toutes les écoles.

Je suis donc d'opinion que l'université est un de ces établissements ou écoles que la législature a dû avoir en

vue lorsqu'elle a prononcé en faveur des élèves ou étudiants des collèges, séminaires et autres écoles publiques, l'immunité de la taxe en question, qu'il n'est pas logique de supposer qu'elle a voulu les exclure puisqu'on ne trouve pas le mot université dans la liste des exemptions.

Voyons quant à la 4e question, si M. Bourdages est un élève de l'Université-Laval, s'il avait ce titre à l'époque de l'imposition de la capitation, et pendant toute la durée de l'année pour laquelle il a été condamné, et si sa qualité d'étudiant en droit sous brevet chez un patron ne l'emporte pas sur celle d'élève de l'Université de manière à justifier sa condamnation pour la capitation en une qualité autre que celle d'élève de l'Université.

J'ai démontré, je crois, que l'Université-Laval devait jouir, quant à la capitation, de la même immunité que les collèges, séminaires et toutes autres écoles publiques. Partant de ce principe, et appuyé de cet autre que les immunités doivent être interprétées d'une manière large et libérale, je me crois justifié à exprimer comme opinion, qu'à moins qu'on n'ait prouvé que M. Bourdages ait eu en la cité de Quebec une occupation indépendante de celle de ses études du droit, sa qualité d'étudiant en droit chez un patron doit être considérée comme subordonnée à celle d'élève en droit à l'université, qu'une qualité ne peut être distinguée de l'autre de manière qu'il puisse être considéré étudier le droit de deux manières, et qu'on doit dire que dans le choix de son école de droit il a dû donner la préférence à l'établissement qui pouvait lui conférer ses degrés de licence en droit en trois ans, plutôt que de prendre pour école de droit le bureau d'un avocat, qui, dans la plus part des cas, ne peut faire obtenir à un étudiant sa commission qu'après quatre ou cinq ans d'études.

Il a été admis en cette cause que le défendeur était et avait été élève de l'Université depuis deux ans à venir au moment de l'institution de la poursuite, conséquemment il se trouve dans la catégorie de ceux déclarés exempts de la capitation.

Pour toutes ces raisons je considère qu'il y a erreur dans le jugement qui m'est soumis, que le recorder a outrepassé ses pouvoirs et sa juridiction en déclarant sujet à la capitulation un élève de l'Université-Laval, et je suis obligé d'annuler sa sentence, avec dépens contre le maire, les conseillers et les citoyens de Québec.

CASAUULT et LANGLOIS, pour le requérant.

BAILLARGÉ, pour la corporation.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

Nos. 503.—*Ex parte*—LANGLOIS, *ès qua.*, *Petitioner.*

Held:—That, in the case submitted, the prothonotary had no right, under the then existing tariff, to the entrance fee upon a petition filed under the 23 Vict., cap. 57, sec. 52.

Jugé:—Que, dans l'espèce, le notaire n'avait pas droit sous le tarif existant alors, à l'honoraire d'entrée sur une requête produite en vertu de la 23 Vict., cap. 57, sec. 52.

Judgment rendered the 6th June, 1861.

This was a rule *nisi* for an attachment, *contrainte par corps*, against the Prothonotary of the Court under the following circumstances; a petition under the 23 Vic., Cap. 57, sec. 52, was presented to the Superior Court on the 4th February, 1861, by Langlois, the petitioner, in his quality of curator to the vacant estate of the late A. Davidson, by which he prayed that the creditors of that estate might be called in. This petition having been taken *en délibéré* came into the hands of the Prothonotary in the usual way. Before filing the petition the Prothonotary demanded a fee of £1 3 9, which the petitioner refused to pay, and upon the Prothonotary's refusal to file such petition without payment of the fee demanded, the petitioner obtained a rule to compel the filing of the petition in question.

For the petitioner it was argued that this was a new proceeding, not included in, nor contemplated by, the tariff of 1810, and that no fee was chargeable upon it.

For the Prothonotary, on the other hand, it was contended that the petition was in the nature of an action, and that similar fees were payable upon it as in an action of the same class.

Judgment :—The Court, having heard the parties on the rule of the 5th of February last, obtained by the petitioner on his motion that inasmuch as the Prothonotary of the Superior Court for Lower Canada in this district hath refused, and still refuses, to file among the records of this Court the petition of the said Fisher Langlois in this cause, although the same hath been duly presented to him for that purpose, an attachment do issue to compel the said Prothonotary forthwith to file the said petition, doth order that the said petition be filed forthwith, and in default thereof that an attachment do issue as prayed for.

LANGLOIS and POZER, for petitioner.

CASAUULT and LANGLOIS, for Prothonotary.

Since the rendering of the above decision, the prothonotary has become entitled to the fee claimed as above by virtue of the tariff of 1861.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
IN APPEAL.

Before :— Sir L. H. LaFontaine, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

EVANS, *Appellant.*
and
BOOMER, *Respondent.*

Held :—That, in the case submitted, it was not necessary that the appellant, an opposant in the Court below, should allege that the property upon which she claimed a right of special mortgage, created in 1848, was held in free and common socage; and that to set aside the collocation of the respondent, also an opposant in the Court below, and who had been ranked before her, it was only necessary to allege the fact in question in her exception to the opposition of the respondent; and that notwithstanding that such fact had not been alleged in her opposition, and did not appear from any part of the record, nevertheless she was entitled to the costs of her contestation, which had been denied her in the Court below.

Jugé :—Que, dans l'espèce, il n'était pas nécessaire que l'appellante, une opposante en Cour inférieure, alléguât que la propriété sur laquelle elle réclamait une hypothèque spéciale, créée en 1848, était tenue en franc et commun socage; et que pour faire mettre de côté la collocation de l'intimé, aussi un opposant en Cour inférieure, qui avait été colloqué à son préjudice, il était seulement nécessaire d'alléguer le fait en question dans son exception à l'opposition de l'intimé; et que nonobstant que ce fait n'eût pas été allégué dans l'opposition de l'appellante, et n'apparût d'aucune partie du dossier, néanmoins elle avait droit aux frais de sa contestation, lesquels lui avait été refusés par le tribunal de première instance.

Judgment rendered the 17th September, 1861.

MONDELET, Justice.—A mere question of costs.

Several lots had been seized and advertised, as belonging to the estate of the late John Jones, they were sold by the sheriff and the monies returned before the Superior Court; none of these lots were advertised as being in free and common socage. Boomer made an opposition, and claimed upon one of those lots, in the usual way, as an hypothecary creditor. Julia Evans had a special mortgage upon the lot in question, but in her opposition she did not allege that the lot was held in free and common socage.

Boomer ignoring that fact, engaged into a contestation with Julia Evans, as to who should rank first in the distribution.

The Court, of course, rejected Boomer's claim, granted

that of Julia Evans, and condemned each party to pay his own costs.

It may, perhaps, be said with some appearance of plausibility, that whether Julia Evans alleged or did not allege that the lot in question was held in free and common soccage, her right, nevertheless, was one which could not be, and ought not to have been, contested, inasmuch as she had a special mortgage, a circumstance which Boomer was bound to take into account. On the other hand she may be told, if you had alleged the tenure of that lot, which Boomer was not bound to know anything about, he would not have contested your claim, so that he also is a sufferer in being deprived of his costs for a pretended fault of his. Upon reflexion, I am disposed to leave the judgment as it is. Julia Evans has been the cause of Boomer's contestation; he, therefore, should have no costs to pay. Boomer gets no costs; but as he has not appealed from the judgment which, perhaps, has done him an injustice, he has no right to expect that this Court will relieve him—I am, therefore, of opinion, that the judgment of the Court below should be confirmed.

MEREDITH, Justice.—In this cause a number of lots of land were brought to sheriff's sale; one of the lots so sold, namely: that described as lot No. 6, being held in free and common soccage. The respondent filed an opposition in which he claimed a general hypothec on all the real estate so sold, under a notarial instrument bearing date the 10th day of November, 1832. The appellant by her opposition claimed a special conventional hypothec upon the said lot No. 6, under a deed bearing date the 22nd day of June, 1848. The fact that the lot No. 6 was held in free and common soccage, did not appear by the sheriff's advertisement, and was not alleged in any of the oppositions.

The prothonotary consequently collocated the respondent to the prejudice of the appellant in the distribution of the proceeds of the sale of lot No. 6; and thereupon the appellant contested the opposition of the respondent, and by her

exception prayed : " That the said opposition of the respondent, in so far as in the conclusions thereof, it was demanded that he should be paid by privilege of hypothec to her prejudice upon the proceeds arising from the sale of the said lot number six, should be dismissed with costs."

The respondent answered, in effect, that the proceedings on his part were regular, that it did not appear upon the face of the record in any way that the lot No. 6 was held in free and common soccage, and prayed that the exception of the appellant should be dismissed with costs.

The fact that the lot No. 6 is held in free and common soccage has been regularly established, and is not denied ; and the judgment of the Court below, in consequence, maintained the contestation of the appellant, but did not grant her costs, on the ground, that as the lot No. 6 was not advertised as a lot held in free and common soccage, the appellant should in her own opposition have alleged the tenure of the lot, as it was from that cause alone that she was entitled to the proceeds of it, to the exclusion of the respondent.

The pretension on the part of the appellant is, that " her claim was perfect to the extent she demanded in her opposition, independent of the manner in which the land had been granted ;" and therefore that it was not necessary for her *in her opposition* to allege the tenure of the land. This view of the case is very ably argued in the factum of the appellant, and in my opinion the arguments urged in the factum, have not been, and cannot be, answered.

The facts alleged in the opposition of the appellant were sufficient to entitle her to her conclusions ; and it became necessary to allege the tenure of the lot No. 6, not for the purpose of strengthening the claim of the appellant, but for the purpose of showing that the claim of the respondent was unfounded ; and therefore that fact was properly made the subject of an exception.

The respondent, it is clear, committed a mistake in claiming a hypothec on lot No. 6. The making of that mistake compelled the appellant to incur certain costs for the protection of her interests; those costs must be paid by some one; and it is obviously more just that they should be paid by the party who made the mistake, than by the party who caused it to be corrected. I would gladly have arrived at a different conclusion, as I am very averse to the disturbing of a judgment upon a question of costs; but I must say I am unable to discover any grounds upon which we would be justified in saying that the appellant, who, according to our view, is in no degree to be blamed, ought to pay her own costs in the Court below. It may be added that the difference between our judgment and that of the Court below, is not confined to the question of costs. On the contrary it extends to the very important rule laid down by the Court below with respect to the allegations contained in the opposition of the appellant.

The judgment of the Superior Court declares that the appellant was bound to allege in her opposition the tenure of the land sold; whereas we think, that as the allegation respecting the tenure of the land was necessary merely for the purpose of showing that the claim of the respondent was unfounded, that that allegation was properly made the subject of an exception to the respondent's opposition.

Judgment.— Considering that the plea of peremptory *exception en droit*, filed by the appellant, Julia Evans, to the opposition *afin de conserver* of the respondent George Boomer was well founded, and maintained by the judgment pronounced by the Superior Court, and the issue raised by the said plea was necessary to enable the said Julia Evans to obtain the conclusions of the opposition *afin de conserver* by her filed in the said Court, that the said Julia Evans was entitled to her costs on the issue raised by her said plea; and that, therefore, in the judgment pronounced by the Superior Court sitting in Quebec on the 4th day of Fe-

bruary, 1861, maintaining the peremptory exception of the said Julia Evans, each party paying his own costs, there is error:—Doth reverse that part of the judgment pronounced by the said Superior Court on the last mentioned day, which orders each party to pay his own costs, and proceeding to pronounce the judgment which the Court below ought to have pronounced, doth confirm that part of the said judgment which maintains the peremptory exception filed by the said Julia Evans in the Superior Court, and doth condemn the said G. Boomer to pay to the said Julia Evans, the costs by her incurred, as well in the Superior Court as in this Court, and that the record be transmitted to the Superior Court.

The following is the judgment of the Court below.

“ The Court, &c., considering that the lot of land set forth and described in the peremptory exception of the said Julia Evans, to the opposition of the said George Boomer, was and is a lot held in free and common soccage, and is not liable for the payment of the debt due to the said George Boomer ; considering, however, that the said lot is not advertised as a lot held in free and common soccage, and that the said Julia Evans should, in her own opposition, have alleged the tenure of the said lot, as it is from that cause alone that she is entitled to the proceeds of it to the exclusion of the said George Boomer ; doth maintain the said peremptory exception of the said Julia Evans, and doth adjudge and declare that the said George Boomer hath no mortgage upon the said lot, each party paying his own costs.”

Extract from the factum of the appellant.

Now if the present appeal is solely instituted in respect of the condemnation that the appellant do pay her own costs, by which she is made to suffer a serious loss and cannot but feel herself aggrieved thereby, yet there is a principle enunciated by the sentence of the Court, which is considered to subvert well established rules respecting pleadings, and to conduce to the laying of burthens upon

suitors, which the law never intended should be imposed upon them, therefore, not only because of the injustice of the appellant's being adjudged to pay her own costs, but also on account of this erroneous principle, which, in fact, led the Court below so to adjudicate in respect of the expences incurred in the conduct of the suit, the appellant respectfully submits the judgment of the Court below ought to be reformed. This judgment holds that the appellant, an opposant in a cause, was not only bound to enunciate in her opposition such facts as were sufficient to indicate her right to obtain that which she demanded, but was further obliged to set forth such matter as would shew that other opposants had no rights, and herein the appellant contends there is manifest error, and again while the judgment maintains the appellant's exception to the respondent's opposition, and declares that he, the respondent, has no mortgage upon the said lot of ground, it yet fails to adjudicate upon the appellant's conclusions for a dismissal of the respondent's opposition, in so far as he prayed that he should be paid by hypothec to her prejudice, and omits also to render any condemnation save that of which the appellant now complains, namely, that she shall pay her own costs. The appellant submits the law requires litigant parties to clearly state the cause and the object of their demand, so that their adversaries may be informed of that which is required at the hands of the Court, and the reasons for which it is demanded, and as there can be no legal demand without a cause of action, the cause must be set forth to shew the right of action, and the opposite party must be informed of it to the end that he may prepare his defence if he have one; therefore the pleading must express that which entitles the party to obtain the object sought; and it need not set forth any thing beyond this: having alleged that, and that only, which is necessary to shew the suitor's right, the law then requires the parties respectively to establish the truth of their allegations; and holds that every pleading of an affirmative nature must be supported

by proof, and directs that the method of ascertaining the truth, or falsehood, of any allegation, is by taking issue upon it, and by a trial, after which it is respectfully submitted as a general rule, that the party who succeeds should obtain his costs against the party who fails; but the burden which the judgment appealed from fastens upon the appellant, is not only that required by law, that she should articulate her own rights, but, in addition to this, that she should make manifest the defects in the imaginary rights of others, and this before she has any knowledge of the pretensions of the party. It not only holds the opposant to declare that she has a special mortgage duly registered, but requires her to inform others that they can have no general mortgage upon the property because it is held in free and common socage; the judgment rightly maintains that she should ascertain what are her claims upon the property, and then wrongly compels her to proclaim what are the defects in any other person's *pretended* claims. It is not satisfied with the appellant having alleged and proved a perfect right to obtain that for which she prayed, but holds, because she did not shew in her opposition that the respondent had no right, she is to blame, and must bear her own expenses incurred by reason of his unfounded demand. It adjudges that she who knew her rights, exposed them correctly to the Court, and solicited that they might be awarded to her, was bound to do more than this, namely: to set forth in her pleadings facts which were of no utility to her; but which shewed that the respondent, who was ignorant of his rights, had no claims upon the premises which he imagined were hypothecated to him. It infers that she was bound to know and set forth in what manner the land had been granted, when her mortgage was unaffected by such grant; while, on the contrary, the respondent, whose hypothec depended upon the tenure of the land, was not expected to know what the species of tenure was. It confounds her right to obtain the conclusions of her opposition upon the sufficiency of her own title, with her being entitled to such conclusions upon an imaginary right to exclude the respon-

dent, which supposed right arose because of the tenure of the lot ; and therefore the Court held the appellant should have indicated the tenure ; but a party's rights must always depend upon the strength of his own cause, and not on the weakness of his adversary's. The appellant's right is not to exclude the respondent, but to obtain that which she asks ; and it is not she who excludes him ; had she been a mere chirographary creditor, and if she had even no claim at all, he still would be without the right he claims : therefore it cannot be her right to exclude him which does exclude him, but his own absence of mortgage upon the property ; and she is collocated by virtue of her own right.

The judgment in effect declares that although the appellant was correct in her contestation, and the respondent was wrong in his demand, still because she had not informed him by her opposition, that his demand, by reason of the tenure of lot number six, was as to that lot without foundation, she must lose her costs occasioned by his mistaken demand, although it necessitated her contestation.

Now the demand of an opposant is, as against all other parties to the cause, the demand of a plaintiff, and the respondent's opposition was an action alleging an hypothec by general mortgage upon that lot number six, of which action the appellant being notified, she, as defendant, pleads he has no such mortgage, because no general hypothec can exist upon the property, its tenure being that of free and common soccage ; yet, because she had not stated this fact in her opposition, which was not at all required for the validity of her hypothec ; and because the respondent was ignorant of that fact which prevented his having any mortgage, such as claimed by him, the Court adjudges her to pay her own costs. But if instead of having claimed, as did the respondent, to be paid out of the proceeds arising from the sale of the lot by virtue of his general hypothec, he had by hypothecary action demanded that the proprietor should give up, *délaisser*, the property or pay the amount due,

secured by general mortgage, would there be a shadow of reason when the tenure of the land was set up as an exception to such action that the party pleading the exception should be told : This is true ; but the plaintiff was not made acquainted with the manner in which the land had been granted, and although you are entitled to exclude him and defeat his claim, yet as you can only do so because the land is held in free and common soccage, and inasmuch as you did not otherwise than by your plea to his demand inform him of this, you must bear your own costs—yet that case and the present hardly differ ; and the appellant considers it a great error to have adjudged her to pay her own costs because she did not in her opposition allege the tenure of the said lot. To her the tenure was of no consequence, to her it gave no rights, her claim was perfect to the extent she demanded in her opposition, independent of the manner in which the land had been granted ; and therefore, evidently, it was unnecessary for her to make any mention of that from which she derived no benefit ; and which in no wise affected her ; and to inflict costs upon her for not having done that which was by no means required of her to support her demand, seems to be most unreasonable.

The judgment which gives rise to the present appeal assigns as another reason why the appellant should pay her own costs, that the lot was not advertised as a land in free and common soccage. To the appellant it appears an entirely erroneous conclusion that she on that account should be mulcted in costs, that she should be made to suffer because the sheriff's advertisement did not indicate the tenure of the land, an act of omission, if it be one to which any responsibility at all attaches, for which the sheriff, or the seizing party, alone should be held liable. It seems to be but equitable, that any person claiming to have an hypothec on a property, should be required to ascertain his rights and not to make a judicial demand on a merely imaginary one ; that the respondent should have discovered

whether in reality the hypothec which he laid claim to existed, and that it was his business to see whether the tenure of the land was such as to exclude his right, as he alone was interested in the question : and therefore he solely should be expected to make the necessary enquiries, and should not be permitted to come before the Court with an unfounded demand, without being held to pay the costs occasioned to any other suitor by reason of such erroneous claim. Is it because the sheriff's advertisement called upon all persons having claims on that lot to file such claims, that therefore the respondent should lodge an opposition by which he sets forth that he has a general mortgage upon such property, while in reality he has none? And is it because the appellant filed her opposition, by which she alleged she had a special mortgage upon the said lot, which she was justified in doing, because her allegation was founded in fact? Is it because the respondent in his opposition declared that the said lot was affected to him by a general hypothec of a date anterior to that of the special mortgage of the appellant, and in consequence of such allegation was necessarily collocated by the Prothonotary in preference to the appellant, and is it because she was thus compelled to contest his opposition in so far as he asked to be collocated by a general mortgage, and by this means she incurred costs, that she should be deprived of those costs because the respondent did not know the tenure of the land in question?

She committed no error ; while the respondent's mistake necessitated the incurring of expences. Yet the judgment of the Court below orders that she shall be the loser of those expences : but obliging her to pay her own costs is in fact deducting so much from the debt due her. The right to a condemnation for costs is accessory to the principal condemnation, and under such circumstances as those submitted to the Court below, the appellant believes the condemnation of the respondent to pay them was not by law permissive in the Court below but was imperative, and that

the not awarding of them to her is in effect a denial of justice. Whatever theory may exist in the minds of some that the giving or the withholding of costs to a successful party, being an entirely discretionary power with a Court, should be finally decided by the tribunal before which the question presents itself originally, and, therefore, that the matter is prohibitory of an appeal; it is believed this honorable Court holds no such doctrine; and that it will not hesitate to entertain, as it has already, mere questions of costs (L. C. Jurist. vol. 2, page 81, Stack and Short): nor will it fail to reverse a decision as to costs, if the Court's dissent from the decree as to costs is strong, clear and undoubted; for if the Court below may deal with costs as it thinks fit, this Court, which is by law called upon to give that judgment which the lower Court should have given, cannot be curtailed of the power to reverse an erroneous decision respecting costs; for by such a judgment a party may be, and in the present instance is, as much damnified as she would have been by an adverse erroneous decree as to a large portion of the debt itself. If it be seen by the Court here that the issues were found in favor of one party, and that that party was as much entitled to recover his debt as he was to a judgment for the object of his demand: If it be found that the appellant was successful on the issue raised between her and the respondent, and that he unsuccessfully opposed her demand; and that it be evident she ought in justice to have been awarded her costs, it would be strange indeed that the Court appealed to should not have the power to do justice between the parties because the Court below had gone astray only upon a question of costs. It is submitted that the law contemplated that this Court, sitting in appeal, should remedy the grievance suffered, whether it arise from a wrong decision in respect of the subject matter in dispute, or of the costs, an accessory attendant upon it.

LEMOINE, for appellant.

ANDREWS, counsel.

STUART and MURPHY, for respondent.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 442. { BERRY,..... Plaintiff.
 vs.
 COWAN, *et al*,..... Defendants.

The defendant, Cowan, became the guardian of effects seized at the instance of Berry, under a writ of *saisie-arrest simple* in a cause wherein he was plaintiff, and one May, defendant; subsequently the same effects were seized and sold, under a writ of *feri facias* issued at the instance of one Tremain; thereupon the plaintiff brought his action against the defendant, praying that the defendant should be held to produce the effects, or to pay the value thereof.—To this action the defendant demurred, and upon this demurrer it was :—

Held :—That if, under the circumstances of the case, the plaintiff had any right to exercise against the defendant, he could not do so by direct action against the defendant, his remedy being by a motion for attachment in the cause wherein he had been appointed guardian, to compel him to produce the effects, or to pay their value.

Le défendeur, Cowan, devint le gardien d'effets saisis à l'instance de Berry, en vertu d'un writ de *saisie-arrest simple* dans une cause dans laquelle il était demandeur, et le nommé May, défendeur; subséquemment les mêmes effets furent saisis et vendus, en vertu d'un writ de *feri facias* émané à la poursuite d'un nommé Tremain; sur ce le demandeur institua son action contre le défendeur, concluant à ce que le défendeur fut condamné à représenter les effets, ou à en payer la valeur.—A cette action le défendeur plaida par défense aux fonds en droit, et sur cette défense il fut :—

Jugé :—Que si, dans les circonstances de la cause, le demandeur avait aucun droit à exercer contre le défendeur, ce ne pouvait être par action directe contre le défendeur, mais bien au moyen d'une règle pour contrainte dans la cause où il avait été constitué gardien, pour le contraindre à produire les effets, ou à en payer leur valeur.

Judgment rendered the 1st October, 1861.

Berry, the plaintiff in the cause, alleged by his declaration that on the 27th October, 1859, at his instance, the sheriff of this district seized and attached, by *saisie arrêt simple* before judgment, all the goods and chattels belonging to one Henry May, his debtor. That a *procès-verbal* having been made, Cowan became the voluntary guardian or *dépositaire* of the goods so seized, and signed the *procès-verbal*, and thereby became bound in law to take charge of and safely to keep the said goods and chattels until they should be required of him by the sheriff, or until he should be otherwise legally discharged from his custody of the said goods. That on the 13th of February, 1860, judgment was rendered in the said cause of Berry vs. May, and the attachment made under the said writ of *saisie-arrest simple* declared good and valid. That afterwards, to wit: on the

27th February, 1860, under color of a certain writ of execution issued from the Circuit Court, in a case of Tremain vs. May, the said goods and chattels were again seized; and that Cowan not regarding his duty as guardian, *dépositaire*, of the said goods and chattels, suffered them to be so illegally seized, and on the 7th of March, 1860, to be sold, and carried away by the *adjudicataire* at the said sale: That by reason of the premises the second seizure and all the subsequent proceedings thereon were and should be held to be illegal, null and void, and Cowan compelled, by *contrainte par corps*, either to bring back the said goods and chattels and deliver them into the hands of the sheriff, or, in default of his so doing, to pay and satisfy to the said Berry the sum of \$3000.00 the value of the said goods and chattels, with interest and costs.

Cowan answered by a *défense au fonds en droit* founded upon the following reasons:

1o. Because it appears by the plaintiff's declaration that the attachment under which the goods and chattels in question were seized by him, was a mere *saisie conservatoire* under a writ of *arrêt simple* before judgment.

2o. Because the writ under which Tremain took the goods and chattels into execution, and under which writ they were sold, was a *saisie-exécution*, and that by reason thereof the *saisie-exécution* had by law *la préférence*.

3o. Because by law Cowan could not, as guardian to a mere *saisie conservatoire*, oppose the proceedings of Tremain, carried on under the sanction of a writ of *saisie exécution*, which by law superseded the *saisie conservatoire*.

4o. Because the fact of a *saisie conservatoire* having by the judgment of the Court in the cause in which such *saisie* had been effected, been declared good and valid (*validée*), does not in law give such *saisie conservatoire* a preference over a *saisie exécution*.

5o. Because by the law of the land no judicial sale can

take place under a writ of *saisie-exécution*, unless and until certain formalities and notices as prescribed by law take place, of which all Her Majesty's subjects are bound to take cognizance.

6o. Because it is not alleged that the said formalities and notices were not given or had.

7o. Because it was not the duty of Cowan, as guardian, nor was he bound in law, nor could he prevent the sale by Tremain of the said goods and chattels.

8o. Because it does not appear in the plaintiff's declaration that the seizure of the goods made by Tremain was irregular, invalid and illegal.

9. Because by the law of the land the guardian or *depositaire* of goods and chattels seized under a writ of any description whatever, cannot be proceeded against by direct action as in the present case, the remedy of the plaintiff, if any he hath, against Cowan, being by a motion for an attachment to compel him to produce the said effects, or to pay their value.

10o. Because it does not appear in the plaintiff's declaration that, up to the period of the sale made of the goods at the instance of Tremain, he was ignorant of the said seizure, or that he was prevented from filing his opposition to the seizure or sale.

11o. Because if Cowan, as guardian, was under any legal obligation towards the plaintiff in respect of any legal process by any other party against the goods and chattels in his charge, such obligation could only be to notify the said plaintiff of such legal process, and because it no where appears in the said declaration that he failed to give due notice thereof to the plaintiff.

For the plaintiff it was contended that the question involved in the case had been decided by the Court of

appeal, in a case of Ouimette vs. Senecal, in which case it was held: "That a direct action will lie to have a sale of "moveables set aside for fraud; and this though a judicial "sale has been resorted to." (1)

Judgment.—The Court, considering the *défense au fonds en droit* of John Cowan, one of the defendants, to be well founded in law, doth maintain the same, and thereupon doth dismiss the present action as regards the said John Cowan, with costs.

HOLT and IRVINE, for plaintiff.

LELIEVRE, for defendant.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 1918.	{	HAMEL <i>et al</i> ,.....	Plaintiffs.
		vs.	
	{	COTÉ <i>et al</i> ,.....	Defendants.

Held :—1o. That where a party has been arrested under a writ of *capias ad respondendum*, and the arrest declared illegal, he must be completely and fully restored to his liberty before he can be arrested under a second *capias*.

2o. That service of a writ on, or the arrest of, a party *entre deux guichets*, is a service on, or arrest of, as the case may be, of a party still remaining under the charge of the jailer.

Semble.—That if the defendant had been arrested by another party in another cause, such rearrest would have been good.

Jugé :—1o. Que lorsqu'un individu a été arrêté en vertu d'un writ de *capias ad respondendum*, et que l'arrestation a été déclarée illégale, il doit être complètement et pleinement remis en liberté avant de pouvoir être arrêté en vertu d'un second *capias*.

2o. Que la signification d'un writ à un individu, ou son arrestation *entre deux guichets*, est une signification ou une arrestation, selon le cas, d'une personne encore sous la garde du geolier.

Il semble.—Que si le défendeur eut été arrêté par une autre personne dans une autre cause, que telle arrestation eut été valide.

Judgment rendered the 5th November, 1861.

The action was commenced in September last by the insuing of a *capias ad respondendum* at the instance of the plaintiffs against Côté, one of the defendants, who was thereupon duly arrested and brought before the Court to

answer the plaintiffs' action. It was moved on behalf of the defendant that the *capias* be set aside and the defendant released, by reason of certain informalities in the affidavit upon which the *capias* had issued; judgment was rendered on the motion on the 4th of October last, granting the conclusions thereof, and ordering Côté's release. The plaintiffs thereupon, and on the same day, produced another affidavit and obtained the issuing of a second *capias*, under which Côté, who had not yet been discharged from the custody of the gaoler, was again arrested and detained in prison.

It was again moved that the second *capias* be set aside and quashed, and that Côté be released from imprisonment, for the following reasons:—

10. Because one writ of *capias ad respondendum* had already issued against him in this cause, in virtue of which he had been imprisoned, and because he had not been released from this imprisonment at the time of his arrest under the second *capias*.

20. Because by the judgment rendered on the 4th of October last the first *capias* was set aside and quashed, and it was ordered that he, Côté, should be restored to liberty.

30. Because two writs of *capias ad respondendum* cannot issue in one and the same cause, and for the same reasons.

40. Because the affidavit in support of the second *capias* was insufficient, and did not contain special and sufficient reasons to entitle the plaintiffs to believe that he, Côté, had secreted his estate, debts and effects with intent to defraud them, &c.

In support of this motion it was contended, that Côté could not be arrested under a second *capias*, while still detained under a prior writ. (1)

(1) 2 Dict. de Droit, vbo. Recommander un Prisonnier :—7 Nouveau Denisart, vbo. Elargissement, p. 443 :—Décision du Palais, vbo. Contrainte par Corps, pp. 254 and 255 :—24 English Law and Equity Reports, p. 147, *Ex parte Eggington*.

That two writs of *capias* could not issue in the same cause, and for the same grounds of action. (1)

The plaintiffs submitted that the authorities cited did not apply to the case under consideration.

STUART, Justice.—The present application to quash a writ of *capias ad respondendum*, the second issued in the present cause, is made on three grounds. 1st That Côté was not liberated from arrest under the first writ before he was again arrested under the present. 2nd That two writs of this nature cannot issue in the same case. 3rd That the affidavit is insufficient. English and French authorities agree that where an arrest is declared illegal, a detainer of the party, called in the french law *recommandation*, is not effective, and numerous authorities under both systems of law have been referred to in argument. This principle is probably only applicable where the arrest is illegal from some fault in the arresting officer, as if the arrest be made on a sunday or in a place where the law protects the party from arrest, but it is thought would not apply to a case like the present, where the sheriff legally arrested the defendant, and where the party is enlarged from custody for informalities anterior to the issuing of the writ—But whatever might be the view taken by the Court of the validity of a detainer by a third person in a case like the present, it is clear that the plaintiffs cannot be allowed to take advantage of what must be considered their own wrong, and engraft upon it a proceeding which will give it the effect of a detainer, the defendant must be set fully at liberty as ordered by the Court, and as that was not done in the present case, the first ground must be considered good.

There is no case in the Courts of Lower Canada that could be produced in which a second *capias* has issued

(1) Tidd's Practice, p. 174 (9th Ed.):—2 Peterdorff's Abridgt, vbo. Arrest (2arrest), pp. 307, 311, 312 and 317:—2 East's Reports, p. 243:—24 English Law and Equity Reports, pp. 148 and 149, *Esparto Eggiton*.

after the first had been quashed, nor has any authority been cited to justify such a step; in the absence of authority and of practice upon a point of this kind, the second ground must also be held good.

As to the third ground although the party making the affidavit swears to the insolvency of the defendant, and to his having carried on business after such insolvency, that is no ground for his arrest unless he has refused to make a *cession de ses biens* to his creditors—this refusal is not sworn to—the *capias* must be quashed.

Jugement.—La Cour, vu la motion faite en cette cause le deux du courant, de la part du dit Majorique Côté pour que le second bref de *capias ad respondendum* émané en cette cause, le quatre octobre dernier, soit annulé et mis de côté, (*quashed*) avec dépens, et, en conséquence, le dit Majorique Côté mis en liberté, pour les raisons mentionnées en icelle dite motion, accorde la dite motion, et ordonne que le dit Majorique Côté soit mis en liberté, avec dépens, etc.

CASALT et LANGLOIS, pour les demandeurs.

LÉGARÉ et MALOUIN, pour le défendeur.

CIRCUIT COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1609. { BERTHELET,..... *Plaintiff.*
 { vs.
 { MUIR *et al*,..... *Defendants.*

<p>Held:—That a tenant who is bound to pay "assessments" is bound for the special tax or rate imposed under the 22 Vict., ch. 15.</p>	<p>Jugé:—Qu'un locataire qui est tenu de payer "les cotisations" est tenu de fournir la taxe spéciale imposée sous la 22me Vict., ch. 15.</p>
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Judgment rendered the 30th November, 1861.

In this case and in two others the question as to the liability of tenants for the special rate under the 22 Vict., ch. 15, was decided by the Court.

SMITH, Justice:—In this case the defendants were bound to pay: “the yearly assessments and water rates of said leased premises, and every other tax, charge and burden, which may be imposed thereon by the Corporation of Montreal during the said term.” In the case of Beaudry, the tenant was bound: “to pay the assessments to which the said leased premises may be subject during the said term;” and in the case of Pinsonault: “to pay for the assessments of the said leased premises during the said term.”

I am of opinion that the tenant who is bound to pay “assessments,” is bound for the special rate or tax imposed under the provisions of the 22 Vict., cap. 15.

Judgment for plaintiffs.

BELLE, for Berthelet.

ABBOTT and DORMAN, for Muir *et al.*

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 789.	{	BROWN,.....	<i>Plaintiff.</i>
		vs.	
		GUGY,.....	<i>Defendant.</i>
		and	
		GUGY,.....	<i>Opposant.</i>

Held :—That where an attorney, party in a cause, appears in person, he is entitled to his fees against his adversary, upon judgment in his favor.

Jugé :—Que lorsqu'un procureur, partie dans une cause, comparait en personne, il a droit à ses honoraires contre son adversaire, sur jugement rendu en sa faveur.

Judgment rendered the 2nd November, 1861.

The opposant, Guky, who had acted as his own attorney, by a motion for the revision of the bill of costs taxed by the prothonotary, not allowing him the attorney's fee, brought the question before the Court as to whether attorneys had the right to charge fees in cases in which, being parties, they had appeared themselves.

The plaintiff supported the taxation relying upon the judgment rendered by the Court of appeals in the case of Guky and Ferguson, in which case it was decided upon a division of three to two, that the appellant who had acted as his own attorney, was not entitled to any fees. (1)

In answer to this decision in appeal the opposant urged that although it was true that such a decision had been arrived at by the Court of appeals, still he maintained it ought not to be final because it was not unanimous, and only arrived at on a decision of three to two, and because, at the argument in appeal, there was not a single authority cited in any way supporting the opinion of the majority of the Court, but, on the contrary, that all the authors whose works were laid before the Court were in favor of that view of the question which was taken by the dissenting justices.

Serpillon in his commentary on the *ordonnance* of 1667 Tit. 31, art. 1, says :

“ Quoiqu’une partie ait fait elle même les écritures de son procès, les dépens ne lui en sont pas moins dus, parce- qu’ils ne serait pas juste, &c., &c.”

Les Coutumes et les décisions des Cours Souveraines par M. C. Ferrière, Paris edition of 1684, vol. 2, page 193.

“ Quoique celui qui a obtenu gain de cause ait fait lui-même toutes les écritures, toutefois il obtiendra la condamnation de dépens contre sa partie, parcequ’il n’est pas juste, etc., etc.”

Pigeau, Procédure Civile, Edition of 1779, vol. 1, page 145. De l’instruction, livre II, partie 2.

“ Les procureurs peuvent exercer leur ministère pour eux, leurs femmes et enfants. ”

TASCHEREAU, Justice.—In this case the opposant, Guky, has produced a great number of authorities in support of his motion, the principal of which are Pigeau, Ferrière and

(1) Guky and Ferguson, ante p 409.

Serpillon. These authorities all concur in granting fees to an attorney who has appeared in his own case.

It is true that a decision, rendered by the Court of appeals on a division of three to two, was arrived at, refusing fees to an attorney in his own case, but when we consider the circumstances under which this decision was rendered, and the weight of the authorities referred to, we can easily imagine that the question will not be looked upon as definitively settled, until some more unanimous opinion be expressed by that tribunal.

Under these circumstances I am inclined to consider the question as still open and undecided, and as all the authorities cited appear in favour of the opposant's pretensions, I will grant the prayer of his motion and reverse the prothonotary's taxation of the bill of costs, in so far as they disallow to the opposant his legal fees as attorney.

Judgment.—Considérant que la taxe faite par le protonotaire du dit mémoire de frais est erronée et contraire au tarif de cette Cour, en ce que le protonotaire a retranché du dit mémoire de frais les honoraires dus au dit opposant, sur le principe que le dit opposant, qui est un avocat et procureur pratiquant devant cette Cour, a lui-même signé son opposition, et l'a lui-même conduite à jugement : Considérant qu'en loi un avocat a le droit de conduire lui-même sa défense devant aucun tribunal, et d'exiger les honoraires qui sont le juste salaire de ses troubles et vacations, et qu'en cela la position de son adversaire ne reçoit aucun préjudice, maintient la dite motion, et ordonne qu'il soit, et il est par ces présentes, accordé au dit opposant une somme de onze louis dix chelins pour ses honoraires sur la conduite de son opposition, en sus des autres items formant son mémoire de frais, mais sans frais sur la dite motion.

PARKIN and PENTLAND, for plaintiff.

GUY, for opposant.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—STUART, Juge.

No. 1278. { GAUDRY,..... . Demandeur.
vs.
MARCOTTE *et al*,..... Défendeurs.

Held:—That the Courts will inquire into the sufficiency of the causes of removal of a school master appointed by School Commissioners, notwithstanding the provisions of the 9th Vict., cap. 27, sect. 21, subsec. 4, by which it is enacted, that it shall be the duty of such School Commissioners; "to appoint and engage from time to time school masters and school mistresses duly qualified to teach in the schools under their control, and to remove them on account of incapacity, neglecting faithfully to perform their duties, insubordination, misconduct or immorality, after mature deliberation at a meeting of commissioners called for this purpose:" and that such removal by the commissioners is not conclusive before the Courts.

Jugé :—Que les tribunaux s'enquerront de la suffisance des causes du renvoi d'un instituteur nommé par des Commissaires d'Écoles, nonobstant les dispositions de la 9me. Victoria, ch. 27, sect. 21, sous-sect. 4, par laquelle il est statué, qu'il sera du devoir de tels Commissaires d'Écoles; "de nommer et engager de temps à autre des maîtres ou maîtresses d'écoles suffisamment qualifiés pour enseigner dans les écoles sous leur contrôle, et de les déplacer pour cause d'incapacité, de négligence à remplir fidèlement leurs devoirs, d'insubordination, d'immoralité, après mûre délibération d'une assemblée des commissaires convoquée spécialement à cet effet:" et que tel renvoi par les commissaires n'est pas concluant devant les tribunaux.

Jugement rendu le 1er Octobre, 1861.

L'action était en dommages pour £500, le demandeur, Gaudry, qui est instituteur en la paroisse de Cap-Santé, se plaignait que le 24 d'octobre, 1859, les défendeurs étaient entrés dans la maison par lui occupée, avec force et armes, tandis que le demandeur était paisiblement occupé à faire l'école, et malgré lui avaient enlevé tout le mobilier qui était dans la dite maison, lequel mobilier les dits défendeurs avaient sorti de la maison et emporté ailleurs.

Que dans cette occasion les dits défendeurs agissant de concert, avaient menacé, assailli et battu le dit demandeur, et avaient empêché par là le dit demandeur de remplir ses devoirs comme instituteur.

A cette action les défendeurs plaidèrent par une défense au fonds en fait, et aussi par une exception péremptoire en droit perpétuelle, dans laquelle exception ils alléguèrent que dans le mois de mars, 1859, les commissaires d'écoles pour la municipalité de la paroisse du Cap-Santé avaient engagé

le demandeur pour tenir une école dans la dite municipalité, arrondissement No. 1, pendant les 12 mois à dater du 1er juillet, 1859.

Qu'aux termes de l'engagement du demandeur, il avait pendant deux mois tenu la dite école, et avait même pris possession du logement destiné aux maîtres d'écoles ou instituteurs pour le dit arrondissement, et de l'école même.

Que depuis plus d'un mois à venir au 10 d'octobre, alors dernier, diverses plaintes ayant été portées contre la conduite du demandeur, les dites plaintes étant relatives à l'incapacité et négligence du demandeur à remplir fidèlement ses devoirs, sa brutalité envers les enfants qui fréquentaient son école, son intempérance publique et scandaleuse, et son insubordination, les dits commissaires, après en avoir informé le demandeur, et le demandeur n'ayant pu justifier sa conduite, après une enquête à une assemblée des dits commissaires, dûment et spécialement convoquée et tenue par eux le dit 10 octobre, alors dernier, (1859) les dits commissaires, ayant constaté que les plaintes portées contre le demandeur étaient bien fondées, avaient destitué et déplacé le demandeur de sa dite charge.

Que le demandeur ayant été notifié de sa destitution avait néanmoins refusé de livrer la dite maison, ainsi que certains effets qui appartenaient aux commissaires, et que sur ce les dits défendeurs, étant alors commissaires d'écoles, étaient entrés en la dite maison d'école, et sans force ni violence, et sans intimidation, avaient transporté dans une autre maison d'école les meubles et effets qui leur appartenaient et étaient en leur possession, et ce dans le but de fournir à la municipalité une autre chambre d'école qui était indispensablement nécessaire, vu que le demandeur s'obstinait avec violence à conserver et occuper le logement susdit, et l'école même, contre la volonté des dits commissaires.

Le demandeur répondit généralement à cette exception.

STUART, Juge.—The question which arises in the present cause is one of considerable importance, and involving the powers of school commissioners to dismiss teachers, without their assigning any ground other than their own view of the necessity of such a step. The facts as stated by the pleadings show that on a given day there subsisted an engagement between the plaintiff and the defendants, that they entered his house and notified him that he must leave the house, and surrender the desks and other effects necessary to enable him to carry on his teaching, as they no longer required his services and had engaged another teacher—they possessed themselves by force of the effects in the school room, and the plaintiff resorted to the present action for redress. The defence is one of a most cruel kind, alleging against the plaintiff incapacity, habitual intemperance and undue severity towards his pupils, (*brutalité envers ses écoliers*)—of which there is not a tittle of evidence. The plaintiff had been for a few years previously the teacher of this school by engagements renewed every year, and had entered upon his fifth year under an engagement recently entered into; thus the character and conduct of the plaintiff must have been perfectly known in the municipality, and the only occasion of intemperance which they proved was a solitary instance during the summer holidays; and it is difficult to understand how a charge of habitual intemperance could be predicated upon such a slender foundation; this charge is the more unworthy that it has let in evidence to show that previous to this time, when the plaintiff first became a teacher in this municipality his habits were not of a sober character; this circumstance induces the Court to visit upon the defendants the consequences of their misconduct with a heavier hand than perhaps it would have done if the mere question of law as to their right to dismiss the plaintiff had been raised without any unjust aspersion upon his character.

The Courts of Justice must be held to be open to teachers employed by these Corporations, as they are to all other

suitors,—and when they invoke a contract and prove it, it is the duty of these commissions to show some solid reason for dissolving the contract which they had entered into, and in the absence of such reasons such contracts must be held to subsist.—Such is the present case ; the Court therefore awards damages against the defendants to the amount of thirty pounds.

Judgment.—“ Considering that the defendants have failed to justify their conduct in entering the plaintiff’s house and carrying away the several effects mentioned in the plaintiff’s declaration, doth overrule and dismiss the peremptory exception ; and considering that the plaintiff was under legal engagement as school master at the parish of Portneuf, and as such had the use of the said several effects ; and considering that no legal ground for his discharge has been shewn, and that the defendants are utterly without justification in their conduct towards the plaintiff ; and considering that the defendants have grossly injured the plaintiff by pleading as they have in present cause, and without being in a position to prove their said plea ; doth condemn the defendants, jointly and severally, to pay to the plaintiff the sum of thirty pounds as damages, with interest thereon from the first day of October, one thousand eight hundred and sixty one, and costs of suit, &c.

Suzor, pour le demandeur.

TASCHEREAU & DUVAL, pour les défendeurs.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1942. { IDLER,..... Plaintiff.
vs.
CLARKE,..... Defendant.

Held :—That a writ of *saisie-gagerie* in an action *en séparation de corps et de biens*, issued on the petition of the plaintiff, alleging that she was credibly informed and verily believed that the defendant, to frustrate her action and rights intended to dispose of, and make away with, his estate, debts, property and effects; the said writ of *saisie-gagerie* so issued by order of a judge in chambers, "to seize and attach all the debts, property and effects of the defendant, wheresoever the same may be found within this district;" will be declared good and valid.

Jugé :— Qu'un writ de *saisie-gagerie* dans une action *en séparation de corps et de biens*, émané sur requête de la demanderesse, alléguant qu'elle était informée et croyait vraiment que le défendeur, pour frustrer son action et ses droits avait l'intention de disposer et de se défaire de ses biens, dettes et effets; le dit writ de *saisie-gagerie* émané sur l'ordre d'un juge en chambre, "pour saisir-gager toutes les dettes, biens et effets du défendeur, en quelque lieu qu'ils se trouveraient dans ce district;" sera déclaré bon et valable.

Judgment rendered the 30th September, 1861.

This was an action by a wife *en séparation de corps et de biens*. In the usual petition to be allowed to *ester en justice* were the following allegations. "That your petitioner is credibly informed and verily believes, that the said E. C., with a view to frustrate any action or proceeding your petitioner might adopt against him, by preventing her from enforcing and recovering her rights against him, intends to dispose of, and make away with, his estate, debts, property and effects, and that without process of *saisie-gagerie*, to seize and attach all the estate, debts, property and effects of the said E. C., wheresoever the same may be found, she may lose her recourse against him and sustain damage." The plaintiff made affidavit: "That the several allegations, matters and things set forth and alleged in the foregoing petition are true;" and an order was made by a Judge in chambers allowing her to *ester en justice*, and further: "that process of *saisie-gagerie* do issue as prayed for, to seize and attach all the estate, debts and property of E. C., wheresoever the same may be found in this district, to abide the further order and judgment of this honorable Court."

The defendant moved to have the writ declared to have been issued improvidently, and without authority of the said Court, and that it be annulled, and the attachment made in virtue thereof declared illegal, null and void, and *main levée* thereof granted. The reasons were, in effect, the following :

1o. That no attachment can issue without an affidavit of debt.

2o. Nor for any unliquidated debt.

3o. That no privilege exists in favor of the wife which authorises her to seize the estate of her husband, previous to judgment of separation.

4o. That there was no indorsation of any amount claimed on the original writ, nor any thing to show upon whose affidavit the writ had issued.

5o. That the form of the writ to seize and attach, where-soever &c., as prayed for by the petition, is illegal, arbitrary and oppressive.

6o. That the attachment was malicious and unauthorised by law, and that the affidavit set forth no sufficient grounds for such attachment.

Judgment: "That the defendant take nothing by his said motion."

DEVLIN, for plaintiff.

STUART, H. for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—MONK, Justice.

LEEMING *et al*,..... *Plaintiffs*.

vs.

ROBERTSON,..... *Defendant*.

Held:—That a defendant foreclosed from pleading and afterwards allowed on affidavit "to file a plea to the merits," on payment of costs, may file a plea denying the fraud and *déconfiture* set up by the plaintiff, and that such plea will be deemed a plea to the merits.

Jugé:—Qu'un défendeur forcé du droit de plaider et auquel il est subéquentement permis sur affidavit, "de produire un plaidoyer aux mérites," peut enfler un plaidoyer déniaut la fraude et la *déconfiture* invoquées par le demandeur, et que tel plaidoyer sera considéré comme un plaidoyer aux mérites.

Judgment rendered the 18th day of October, 1861.

The action was commenced by an attachment before judgment against the goods and chattels of the defendant, to recover the amount of certain promissory notes not due, and was returnable on the 8th of July, 1861: On the 13th of September following, a plea was demanded, and a foreclosure was filed on the 19th. On the 21st of the same month notice was given by the defendant that he would move on the 23rd to be allowed to file a plea; the application was supported by the affidavit of the defendant that he had a good defence to the action, and on the 30th of September a judgment was rendered permitting the defendant "to file a plea to the merits, upon payment of twenty shillings costs."

On the 30th the defendant filed a plea in which he denied the secretion, fraud and *déconfiture* set up by the plaintiffs.

A general answer was filed on the 8th October, and on the 16th the plaintiff moved that the plea be rejected: "because it was not a plea to the merits of the action." Reference was made at the argument on the motion, to the judgment of the Court of appeals rendered on the 6th September, 1851, in a case of Leslie *et al*, appellants, and Molson's Bank, respondents, in which it was held (reversing

the judgment of the Superior Court, Montreal) that the secretion, fraud and *déconfiture*, set up in the affidavit, could be put in issue by exception.

On the 30th October the Court rejected the motion, holding that the plea was a plea to the merits.

CARTER and GIROUARD, for plaintiffs.

DUNLOP, for defendant.

CIRCUIT COURT.—DISTRICT OF ARTHABASKA.

Before :—STUART, Justice.

No. 1501.	{	RIVET,.....	Plaintiff.
		vs.	
		POISSON,.....	Defendant.

Held :—That where in a declaration the amount demanded is in *figures*, an exception to the form will lie, and the action dismissed on such exception, although the action be non-appelable.

Jugé :—Que lorsque dans une déclaration le montant demandé est en chiffres, une exception à la forme sera déclarée bien fondée, quoique l'action soit non-appelable.

Judgment rendered the 11th November, 1861.

In this case the plaintiff prayed by his declaration for a condemnation against the defendant for the sum of twenty-two pounds, amount of a promissory note therein described. The amount prayed for being in figures, (£22 0 0) an exception to the form was filed by the defendant, which exception was maintained and the action dismissed with costs; the Court observing that the law knew of no such thing as figures, and no better ground of exception could have been offered to a declaration.

LAFRENAYE and ARMSTRONG, for plaintiff.

HOULE, for defendant.

“ directed to cause judgment to be entered for the appellants,
 “ the plaintiffs in the original suit, accordingly.”

SMITH, Justice.—The bank has produced a copy of the judgment of Her Majesty in Her Privy Council directing this Court to enter judgment for the plaintiffs: the sole question before me is this,—is there an order of Her Majesty which I can enforce, and shall I obey it?

It was argued that there was no motive given in the judgment of the Privy Council, and that an inferior Court could not be ordered by a Court of appeals to render any particular judgment; but this does not seem to me to warrant my refusing to carry out the judgment, and I must order judgment to be entered up accordingly.

On the 23rd September a motion was made by the defendants praying *acte* of their declaration of the decease of Marie Claire Perreault, one of the defendants, and that all proceedings be suspended until the *instance* be taken up. On this motion, judgment was also rendered on the 30th September, 1861, granting *acte* as prayed for, but rejecting that part which related to the suspension of proceedings.

BETHUNE and DUNKIN, for plaintiffs.

ABBOTT and DORMAN, for defendants.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1900. { SECRETAN,..... Plaintiff.
 vs.
 { FOOTE, *et al.*..... Defendants.

Held:—That where a party is required to proceed "by motion," a notice of motion is equivalent to moving the Court, although such notice of motion be given on a day upon which the Court is in session and during the term—and that such notice of motion has the effect of a rule *nisi*.

Jugé:—Que dans les cas où il est nécessaire qu'une partie procède "par motion," un avis de motion équivaut à une motion faite Cour tenante, quoique tel avis de motion soit donné pendant les séances de la Cour et pendant le terme—et que tel avis de motion a l'effet d'une règle *nisi*.

Judgment rendered the 5th day of November, 1861.

The issue in this cause had been perfected on the 1st of October, 1861, by the filing, on that day, of the defendants' answers which had been served on the plaintiff's attorney, the day before. On the 2nd day of November following the defendants moved the Court for a jury trial, having, on the 5th day of October preceding, whilst the Court was sitting, given the plaintiff notice of such intended motion.

SECRETAN, on behalf of plaintiff.—I oppose the granting of this motion on the following grounds. By the 64th rule of practice of this Court, a party desiring a trial by jury must "declare his option, either by his declaration or plea, or "by motion to be made within four days after the issue is "perfected." This, the defendants have not seen fit to do. They have not, in any of their pleas or by any document by them filed in this cause, declared such option—and in now moving the Court after the lapse of nearly one month, I take it they have forfeited their right to make such application. As this Court was in session on the 5th of October last, they had it in their power to move the Court then, and thereby comply with the exigencies of the rule, the more so, as by the 58th rule of practice, a motion: "For a jury trial—*nisi*," is one of those which "may be "made and filed in the office of the Prothonotary, and be

“ by him received, and rules entered thereon, in the same manner as if made in open Court.” A mere notice of motion may, under very particular circumstances, during vacation and where no sitting of the Court will be held until after the period within which it is required to be moved, be held as an act of due diligence and as a compliance with the law; but, I submit, that in no case, can such a proceeding be sanctioned, where the party had it in his power, through means of a session of the Court, to comply with the rule, by moving during term.

ALLEYN, for the defendants.—I think that in any case a notice of motion has the same effect as a rule of Court. I cannot see any difference between a notice of motion and a rule. Even had I in the first instance moved the Court and caused a rule to issue, no decision could have been given upon it until this day; so that, in reality, it makes no difference whether I proceeded by motion or by notice. Besides, this question has already been decided in a case at Montreal on a motion for security for costs, where the writ was returned in vacation and there was no sitting of the Court until after the lapse of the period within which security should be moved for. (1)

SECRETAN.—The case quoted by the defendants does not appear to me to apply to the present one. There, the writ was returned in vacation, and there being no sitting of the Court, it, consequently, could not be resorted to, in order to make the application. But, in this case, the Court was sitting and could have been applied to, in accordance with the rule, and there was no necessity whatever for resorting to a notice of motion, between which and a rule of Court there is, I maintain, a wide difference.

Judgment—Motion allowed.

STUART and MURPHY, for plaintiff.

ALLEYN, for defendants.

(1) 5 L. C. Jurist, p. 252.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2254. { JOSEPH,..... Plaintiff.
 vs.
 { OSTELL,..... Defendant.

By consent of the parties, arbitrators and *amicales compositeurs* were named, with power, "after being duly sworn," to hear the parties and their witnesses, "the said witnesses being first duly sworn before a commissioner of the Superior Court." The arbitrators made a report in which they stated, "that after being duly sworn," and hearing the parties and their witnesses, duly sworn before a commissioner, they were of the opinion stated by them. No copy of the form of the oath administered or any certificate of the swearing were produced.

Held :—On motion by the plaintiff, that the arbitrators were not bound to produce the notes of evidence taken by, and papers produced before, them; and on motion by the defendant to homologate the report, the Court ordered that the report be sent back to the arbitrators to produce evidence of their having been sworn.

Du consentement des parties, des arbitres et *amicales compositeurs* furent nommés, avec pouvoir, "après avoir été dûment assermentés," d'entendre les parties et leurs témoins, "les dits témoins étant d'abord dûment assermentés devant un commissaire de la Cour Supérieure." Les arbitres firent un rapport dans lequel ils dirent, "qu'après avoir été dûment assermentés," avoir entendu les parties et leurs témoins, dûment assermentés devant un commissaire, ils étaient de l'opinion énoncée par eux. Aucune copie de la formule du serment administré ou aucun certificat ne furent produits.

Jugé :—Sur motion du demandeur, que les arbitres n'étaient pas tenus de produire leurs notes des témoignages, et les papiers produits devant eux; et sur motion du défendeur pour l'homologation du rapport, il fut ordonné que le rapport serait renvoyé aux arbitres pour production de la preuve qu'ils avaient été assermentés.

Judgment rendered the 30th September, 1861.

The action was brought to recover five hundred pounds damages for an alleged breach of contract by the defendant, in building with bad materials and inferior workmanship a certain house for the plaintiff. The defendant pleaded two exceptions, but made no incidental demand.

By a consent rule, the case was referred to arbitrators and *amicales compositeurs*, with power, "after being duly sworn," to examine the buildings, "hear the parties and their witnesses, if they produce any, the said witnesses being previously duly sworn before a commissioner of the Superior Court, and to adjudicate on the respective pretensions of the parties and to report."

The arbitrators filed their report *en brevet* before notaries, in which report they stated that, after "*being duly sworn*,"

and after having examined the buildings, "heard the parties
 " and their witnesses, duly sworn before a commissioner
 " to receive affidavits in the Superior Court of Lower Ca-
 " nada, they were of opinion that the plaintiff was entitled
 " to no damages, but that the defendant was entitled to
 " receive from the plaintiff £61 1 4, balance due on the
 " contract, after deduction made to make the buildings
 " according to contract."

On the 21st September, 1861, the plaintiff moved that the arbitrators be ordered to produce before the Court the minutes of the testimony taken, and all papers produced before them, in support of the pretensions of the parties, and the defendant moved for the homologation of the report.

Judgment: "The Court &c., doth order that the report be
 " sent back to the said arbitrators, *amiables compositeurs*,
 " to shew proof of having been sworn."

Plaintiff's motion rejected.

CHERRIER, DORION and DORION, for plaintiff.

McKAY and AUSTIN, for defendant.

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AFFIDAVIT.—*Vide* CAPIAS.—PROMISSORY NOTE.

AGENTS,—POWER OR.

The plaintiffs hearing that one of their country debtors was fraudulently making away with his property, sent a clerk to the spot to make inquiries, but without special instructions or power. The clerk took the debtor's note for 5s. in the pound, which was refused by the plaintiffs and sent back.

Held:—In an action for the original debt, that the receipt and discharge were not binding on the plaintiffs, the clerk having exceeded his authority.

Seymour vs. Woodbury.

Les demandeurs ayant appris que l'un de leurs débiteurs à la campagne recélait frauduleusement ses effets, envoyèrent un commis sur les lieux pour s'en enquérir, ne lui donnant aucune instruction spéciale ou aucune autorité. Le commis prit le billet du débiteur pour 5s. dans le louis, lequel les demandeurs refusèrent.

Jugé:—Dans une action pour la dette originaire, que le reçu et la quittance ne liaient pas les demandeurs, le commis ayant excédé son autorité.

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AMEUBLISSEMENT.—REALISATION.—PROPRE.

Held:—1o. That in the case of a marriage contract with a covenant of *ameublement*, and a clause of *réalisation* in the event of renunciation of the community by the wife, the wife *séparée de biens* cannot claim by way of *reprise* the enjoyment of the proceeds of the sale of an immoveable property given

Jugé:—1o. Que dans le cas d'un contrat de mariage avec stipulation d'ameublement, et cependant clause de réalisation au cas de renonciation par la femme à la communauté, la femme *séparée de biens* ne peut réclamer comme reprise la jouissance du prix d'aliénation d'un immeuble donné pendant la

by the mother to her adopted daughter and her husband during the community, with condition that such property could not be seized but would serve to procure aliments.

2o. That the property given by such donation does not become a *propre* of the wife.

3o. That the report of the notary which awarded the same to the wife and the judgment homologating such report is not binding upon third parties contesting the claim of the wife.

4o. That, in the case submitted, the respondents had a right to be collocated in preference to the appellant.

communauté par la mère à une fille adoptée et à son époux, avec condition d'insaisissabilité et pour servir d'aliments.

2o. Que telle donation ne forme pas un propre à la femme.

3o. Que le rapport du praticien qui en a accordé la reprise à la femme et le jugement homologuant ce rapport ne lient aucunement les tiers qui peuvent contester la réclamation de la femme.

4o. Que, dans l'espèce, les intimés avaient droit d'être colloqués préférablement à l'appelante.

Jarry and The Trust and Loan Company.

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ARBITRATORS.—REPORT OF.

By consent of the parties, arbitrators and *amicales compositeurs* were named, with power, "after "being duly sworn," to hear the parties and their witnesses, "the "said witnesses being first duly "sworn before a commissioner of "the Superior Court." The arbitrators made a report in which they stated, "that after being duly sworn," and hearing the parties and their witnesses, duly sworn before a commissioner, they were of the opinion stated by them. No copy of the form of the oath administered or any certificate of the swearing were produced.

Held:—On motion by the plaintiff, that the arbitrators were not bound to produce the notes of evidence taken by, and papers produced before them; and on motion by the defendant to homologate the report, the Court ordered that the report be sent back to the arbitrators to produce evidence of their having been sworn.

Joseph vs. Ostell.

Du consentement des parties, des arbitres et amiables compositeurs furent nommés, avec pouvoir, "après "avoir été dûment assermentés," d'entendre les parties et leurs témoins, "les dits témoins étant d'abord dûment assermentés devant "un commissaire de la Cour Supérieure." Les arbitres firent un rapport dans lequel ils dirent, "qu'après "avoir été dûment assermentés," avoir entendu les parties et leurs témoins, dûment assermentés devant un commissaire, ils étaient de l'opinion énoncée par eux. Aucune copie de la formule du serment administré ou aucun certificat ne furent produits.

Jugé:—Sur motion du demandeur, que les arbitres n'étaient pas tenus de produire leur notes des témoignages, et les papiers produits devant eux; et sur motion du défendeur pour l'homologation du rapport, il fut ordonné que le rapport serait renvoyé aux arbitres pour production de la preuve qu'ils avaient été assermentés.

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ARCHITECT.—COMMISSION.

Held:—That an architect named in a contract for the building of houses, has a right to recover from

Jugé:—Qu'un architecte nommé dans un bail d'ouvrage pour la construction de maisons, a droit de re-

the proprietor compensation for his services, not by way of commission, but by way of *quantum meruit*.

couver du propriétaire une rémunération pour ses services, non à titre de commission, mais comme *quantum meruit*.

Footner and Joseph.

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ARGUMENTATIVE PLEA.—*Vide* PLEADINGS.

ARREST.—*Vide* CAPIAS.

ASSESSMENT.—*Vide* SCHOOL COMMISSIONERS.—TAX.

ASSIGNMENT.—*Vide* DELAISSEMENT.

ASSIGNMENT.—DEBTOR.—COSTS.

Held:—That an assignment made by a debtor to trustees for the benefit of his creditors, subsequently re-naliated by reason of the payment of his debts, is entitled to be replaced in full possession of the remainder of the effects assigned, as well those that remain, as the monies, proceeds of those sold; and that he is entitled to recover such effects, even in the hands of third parties, without notification of the judgment awarding him the effects, saving the question of costs upon the recovery.

2o. That, in the case submitted, the defendant who had purchased from the trustees, and who owed a balance, having contested the whole claim, without making any tender, must be condemned to pay costs.

Hagan and Wright.

Jugé:—1o. Qu'un transport fait par un débiteur à des syndics pour le profit de ses créanciers, ayant été depuis réalié à la suite du paiement des dettes, ce débiteur est rentré en pleine possession de tout ce qui pouvait rester des biens par lui transportés, soit en nature, soit en deniers réalisés ou en créances en provenant; et qu'il peut en obtenir le recouvrement en justice, même contre les tiers, sans avoir signifié le jugement de rétrocession, sauf la question des frais sur cette demande.

2o. Que, dans l'espèce, le défendeur qui avait acquis des syndics et redevait une balance, ayant contesté entièrement la demande, sans faire aucune offre réelle, doit être condamné aux dépens.

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ATTORNEY.—*Vide* COSTS.—PLEADINGS.—PRESCRIPTION.

BAIL.—RESCISION.

Held:—That a lease may be rescinded in default of the premises leased having been provided by the lessor with a privy, when, from the want of it, such premises have become unwholesome.

Lumbert vs. Lefrançois.

Jugé:—Qu'un bail peut être rescindé faute par le locateur d'avoir pourvu de lieux d'aisance la maison louée, quand, par suite de cette absence, les prémisses sont devenues insalubres.

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BAILIFF'S RETURN.—*Vide* EXECUTION.

BAILLEUR DE FONDS,—RIGHTS OF.—COMMUNAUTÉ.

The real estate belonging to the community of property formerly existing between the defendant and his late wife, was sold by the sheriff in an action brought by the plaintiff as representing the *bailleur de fonds*; in which action the defendant was condemned personally, and as tutor to his minor children, jointly and severally, to pay to the plaintiff £45 10, one half of the capital of the *bailleur de fonds* claim, which, with interest and taxed costs, amounted to £131 10 11. The children, as representing their mother, intervened by their tutor *ad hoc*, and contested the collocation of the plaintiff to the extent of £51 13 3, on the ground that one half of the monies belonged to them, and that they were only liable for one half of the capital and interest, and not for any costs.

Held:—That the contestation was unfounded.

Doutre vs. Green, and Pollico.

Les propriétés immobilières de la communauté qui avait existé entre le défendeur et sa défunte femme, furent vendues par le shérif dans une action portée par le demandeur comme représentant le bailleur de fonds; dans laquelle action le défendeur fut condamné personnellement, et comme tuteur à ses enfans mineurs, solidairement, à payer au demandeur £45 10, moitié du capital de la réclamation du bailleur de fonds, laquelle, avec intérêt et dépens, s'élevait à £131 10 11. Les enfans, comme représentant leur mère, intervinrent par leur tuteur *ad hoc*, et contestèrent la collocation du demandeur jusqu'à concurrence de £51 13 3, pour la raison que moitié des argens leur appartenait, et qu'ils n'étaient responsables que pour moitié du principal et des intérêts, et non pour les frais.

Jugé:—Que la contestation n'était pas fondée.

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BANK STOCK.—TUTOR.—POWERS.

Held:—1o. That the power of a tutor, without the sanction of a Court of Justice having been previously obtained, does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character; and further that his power is also restricted from selling any portion of the moveable property of the ward without the intervention and previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily cease to exist, or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of

Jugé:—1o. Que sans autorisation en Justice préalablement obtenue, les droits d'un tuteur ne s'étendent pas à vendre les propriétés immobilières de son pupille, ou aucune partie de ces propriétés qui a le caractère d'immeubles; et de plus que ses pouvoirs ne s'étendent pas à vendre aucune partie des propriétés mobilières de son pupille sans l'intervention et la sanction d'une cour de justice préalablement obtenue, excepté ces portions qui ne produisent aucun revenu, et aussi les effets qui étant d'une nature périssable cesseront nécessairement d'exister, ou qui, pour des causes permanentes, auront perdu de leur valeur à l'époque où le pupille atteindra son âge de majorité; et ce pouvoir restreint de disposer des propriétés qui ne produisent aucun revenu, est encore limité par une restriction quant à la disposition d'effets qui ont le caractère de meubles de famille

articles in the nature of heir-looms, as to which an hereditary *pretium affectionis* is attached; and that shares in a bank, or bank stock, fall within the description of *moveable property* which the tutor cannot dispose of without authority.

20. That the sale of shares in a Bank by a tutor, must be treated not as a voidable transaction but as actually void, and that, therefore, the persons who bought the shares need not be included in any action brought in relation to such shares.

Heirlooms, et auxquels l'on attribue un prix d'affection héréditaire; et que des actions ou parts de banque tombent dans la catégorie de propriété mobilière dont le tuteur ne peut disposer sans autorité.

20. Que la vente par un tuteur d'actions ou parts de banque, ne doit pas être considérée comme une transaction annulable mais comme absolument nulle, et que, partant, il n'est pas nécessaire que les personnes qui ont acheté ces parts soient mises en cause dans aucune action touchant telles parts.

The Bank of Montreal and Simson.

377

BEACHES.—HARBOUR COMMISSIONERS.—TRINITY HOUSE.

Held:—That the beaches of the north shore of the river St. Lawrence are now vested in the Quebec Harbour Commissioners, and that they alone have the control and management of the same, as also the right of punishing any person who may encroach upon, or encumber, them, and that the Trinity-House act, in so far as it conferred any powers of control and management over those beaches, is repealed by implication.

Jugé:—Que les grèves de la rive nord du fleuve St. Laurent sont maintenant possédées par les Commissaires du Hâvre de Québec, et qu'ils ont seuls le contrôle et l'administration de ces grèves, comme aussi le droit de punir toute personne qui empiète sur, ou embarrasse les dites grèves, et que l'acte de la maison de la Trinité, en autant qu'il conférait aucun pouvoir de contrôle et d'administration sur ces grèves, est rappelé par implication.

Exparte—Lane.

453

BOND IN APPEAL.

Held:—That a bond upon an appeal entered into before the issuing of the writ of appeal, is null and void.

Jugé:—Qu'un cautionnement en appel consenti avant l'émanation du writ d'appel, est nul et de nul effet.

Burroughs and Simpson,

72

BY-LAW.—*Vide* MUNICIPALITY.—WATER TAX.

BY-LAW.—CERTIORARI.

In the Recorder's Court, Montreal, the applicant was condemned to pay a fine and to imprisonment for having sold fresh pork in his shop, within the city, contrary to the by-law of the Corporation No. 196.

Dans la Cour du Recorder, Montréal, le requérant fut condamné à payer une amende et à être emprisonné pour avoir vendu du porc frais dans son magasin, dans la cité, en contravention au règlement de la corporation No. 196.

Held:—That the by-law was not applicable to the case in question, such by-law only prohibiting the exposition and sale of provisions &c., in the streets, lanes, squares, and public places, other than the public markets of the City.

Exparte—Daigle.

Jugé:—Que ce règlement n'était pas applicable à l'espèce, ce règlement n'interdisant que l'exposition et vente de provisions, etc., dans les rues, places, ruelles, et places publiques, autres que les marchés publics de la cité.

289

CAPIAS.—AFFIDAVIT.

1. Held:—That in an affidavit for a writ of *capias ad respondendum* against a trader, it is necessary to allege, 1o. the insolvency of the debtor, 2o. that such debtor, being insolvent, refuses to make assignment of his effects in favor and for the advantage of his creditors.

Hamel vs. Côté.

1. Jugé:—Que dans un affidavit pour un writ de *capias ad respondendum* contre un commerçant, il est nécessaire d'alléguer, 1o. l'insolvabilité du débiteur, 2o. que tel débiteur, étant insolvable, refuse de faire cession de ses biens en faveur et pour l'avantage de ses créanciers.

446

Affidavit to hold to bail.

2. Held:—That an affidavit to hold to bail, which sets forth the essential allegations as required by the 12th, Vic., Cap. 42, in the disjunctive, instead of in the conjunctive form, is bad, and the *capias* must be quashed.

Talbot vs. Donnelly.

Jugé:—Qu'un affidavit pour *capias*, qui contient les allégations essentielles requises par la 12me. Vic., ch. 42, dans le disjonctif, au lieu d'être alléguées dans la forme conjonctive, ne peut valoir, et le *capias* doit être annulé.

5

Arrest.—Re-arrest.

3. Held:—1o. That where a party has been arrested under a writ of *capias ad respondendum*, and the arrest declared illegal, he must be completely and fully restored to his liberty before he can be arrested under a second *capias*.

2o. That service of a writ on, or the arrest of, a party *entre deux guichets*, is a service on, or arrest of, as the case may be, of a party still remaining under the charge of the jailer.

Semble.—That if the defendant had been re-arrested by another party in another cause, such re-arrest would have been good.

Hamel vs. Côté.

Jugé:—1o. Que lorsqu'un individu a été arrêté en vertu d'un writ de *capias ad respondendum*, et que l'arrestation a été déclarée illégale, il doit être complètement et pleinement remis en liberté avant de pouvoir être arrêté en vertu d'un second *capias*.

2o. Que la signification d'un writ à un individu, ou son arrestation *entre deux guichets*, est une signification ou une arrestation, selon le cas, d'une personne encore sous la garde du geolier.

Il Semble.—Que si le défendeur eut été arrêté par une autre personne dans une autre cause, que telle arrestation eut été valide.

479

CERTIORARI.—*Vide BY-LAW.*

CHILDREN AND GRAND CHILDREN.—*Vide Will.*

COLLISION.—RESPONSABILITY FOR.—PILOT.—COSTS.

For a collision occasioned by the mismanagement of a pilot, taken on board and placed in charge of a ship in conformity with the requirements of the law, enforced by a penalty, the vessel is not liable.

The mode, the time and the place of bringing a vessel to an anchor, is within the peculiar province of the pilot who is in charge.

When a vessel is lying at anchor, and another vessel is placed voluntarily by those in charge in such a position that danger will happen if some event arises, which is not improbable, those in charge of the second vessel must be answerable.

It is the practice of the Admiralty Court not to give costs on either side where the damages have been found to proceed from the fault of the pilot alone.

Sur collision occasionnée par l'impéritie d'un pilote pris a bord et mis en charge d'un vaisseau en conformité aux dispositions de la loi, sanctionnées par une pénalité, le vaisseau n'est pas responsable.

La manière, le temps et le lieu de mettre le vaisseau a l'ancre, sont spécialement du ressort du pilot qui en a la direction.

Quand un vaisseau est a l'ancre, et qu'un autre vaisseau est volontairement placé par ceux qui en ont la direction de manière a ce qu'il y aura danger en certains cas, qui ne sont pas improbables, ceux qui ont la direction du second vaisseau sont responsables.

D'après la pratique de la Cour d'Amirauté il n'est accordé aucun frais où les dommages sont le résultat de la faute du pilote seul.

The Lotus,—Clark.

342

COLLOCATION.—*Vide Costs.*COMMISSION.—*Vide ARCHITECT.*COMMUNAUTE.—*Vide BAILLEUR DE FONDS.*CONDITION.—*Vide PROMISSORY NOTE.*

CONFESSION OF JUDGMENT.—PARTNER.—DISSOLUTION OF PARTNERSHIP.

Held:—That a partner, after dissolution, cannot confess judgment in an action brought against the late copartnership, and that judgment entered up upon such confession will be set aside upon opposition *afin d'annuler*.

Semble:—That, even if the copartnership had still subsisted, it is doubtful if one partner could give a confession of judgment for both.

Jugé:—Qu'un associé, après dissolution, ne peut confesser jugement sur une action portée contre la ci-devant société, et que jugement rendu sur telle confession sera mis de côté sur opposition afin d'annuler.

Il semble:—Que, dans le cas même où la société eut encore subsisté, il est douteux qu'un associé pût donner une confession de jugement pour les deux.

The Canada Lead Mine Company vs. Walker and Steiven.

433

CONFESSOR.—*Vide LEGACY.*

CONTRAINTE PAR CORPS.—WOMAN SEPARÉE DE BIENS.—SERVICE
OF RULE.

Held:—That a rule for a *contrainte par corps* against a woman *sous puissance de mari*, though *séparée de biens* from her husband, will be rejected, unless notice of the rule be given to the husband.

Jugé:—Qu'une règle pour *contrainte par corps* contre une femme *sous puissance de mari*, quoique *séparée de biens*, sera rejetée, à moins que signification de la règle ne soit faite au mari.

McDonald vs. McLean, and Wilson and Doyle.

6

CONVICTION.—*Vide* SEAMEN'S WAGES.

CONVICTION.—JURISDICTION.—PUBLIC BRIDGES.

Held:—That upon conviction by a justice of the peace under "The Lower Canada municipal and road act of 1855," it must appear, 1o. That the justice of the peace had jurisdiction. 2o. Whether the road in question was a front road or a by-road, and whether there was or was not a *procès-verbal*.

2o. That the conviction will be quashed if the defendant is complained of in relation to a road, and is convicted by reason of a bridge.

3o. That bridges above ten feet are public bridges.

4o. That under the said act a justice of the peace has no jurisdiction in a case for money laid out and expended for repairs; his jurisdiction only extending to cases for the recovery of fines or penalties.

Jugé:—1o. Que sur conviction par un juge de paix sous "L'acte des municipalités et des chemins du Bas-Canada de 1855," il doit apparaître, 1o. Que le juge de paix avait jurisdiction. 2o. Que le chemin duquel il s'agit est un chemin de front ou une route, et qu'il y a ou qu'il n'y a pas *procès-verbal*.

2o. Que la conviction sera déclarée nulle si le défendeur est poursuivi par rapport à un chemin, et s'il appert qu'il est condamné pour un pont.

3o. Que tout pont au dessus de dix pieds est pont public.

4o. Que sous le dit acte un juge de paix n'a pas jurisdiction lorsqu'il s'agit d'une somme d'argent dépensée par un officier des chemins pour réparations; sa jurisdiction ne s'étendant qu'aux cas où il s'agit d'amendes ou pénalités.

Matte and Brown.

443

COSTS.—*Vide* ASSIGNMENT.—COLLISION.—PEREMPTION D'INSTANCE.—
PLEADINGS.—RIPARIAN PROPRIETORS.

COSTS.—ATTORNEY.

1. Held:—That where an attorney, party in a cause, appears in person, he is entitled to his fees against his adversary, upon judgment in his favor.

Jugé:—Que lorsqu'un procureur, partie dans une cause, comparait en personne, il a droit à ses honoraires contre son adversaire, sur jugement rendu en sa faveur.

Brown vs. Gugsy.

453

Collocation.

2. Held :—That a party erroneously collocated, *ultra petita*, must pay the costs of the contestation of such collocation, although on receiving it he immediately gave notice of acquiescing in it, with a consent that judgment should be given as demanded in the contestation, but without costs against him.

Jugé :—Qu'une partie colloquée par erreur, *ultra petita*, doit payer les frais de contestation de telle collocation, quoiqu'en la recevant il eut donné immédiatement avis qu'il y acquiescait, avec un consentement que jugement fut rendu suivant les conclusions de telle contestation, mais sans frais contre lui.

Adams vs. Hunter, Evans and McKenzie.

172

COUNTY WORK.—*Vide* MUNICIPALITY.DAM.—*Vide* SEIGNIORIAL RIGHTS.DAMAGES.—*Vide* SEIGNIORIAL RIGHTS.DEBTOR.—*Vide* ASSIGNMENT.

DEFAULT DE CONTENANCE.—ADJUDICATAIRE.

Held :—That an *adjudicataire* claiming a reduction of the price of his adjudication, by reason of a *défaut de contenance*, must proceed by petition and not by opposition; and he must give notice of his proceedings to all the parties in the cause.

Jugé :—Qu'un adjudicataire réclamant une réduction de son prix d'adjudication, en raison d'un défaut de contenance, doit procéder par voie de requête et non par voie d'opposition; et il doit donner avis de ses procédures à toutes les parties dans la cause.

Quebec Building Society vs. Jones.

430

DELAISSEMENT.—ASSIGNMENT.

Held :—That the purchaser of immovable property who has accepted an assignment of the price of sale, cannot set up, in answer to the claim of the assignee, a demand *en délaissement* made against him, so long as he has not been judicially dispossessed.

Jugé :—Que l'acheteur d'un héritage qui a accepté le transport de son prix d'achat, ne peut opposer, à l'encontre de la réclamation du cessionnaire, la demande en délaissement portée contre lui, tant qu'il n'y a pas dépouillement judiciaire et éviction complète.

Lacombe and Fletcher.

38

DELIVRANCE DE LEGS.—WILL.—LEGACY.

Held :—That since the passing of the act of the 41st Geo. III, chap. 4, the *délivrance de legs* required by the french law under the operation of the Custom of Paris, has ceased to be necessary.

Jugé :—Que depuis la passation de l'acte de la 41me Geo. III, chap. 4, la délivrance de legs voulue par le droit français sous l'empire de la Coutume de Paris, n'est plus nécessaire.

Blanchet and Blanchet.

204

DEMURRER.—*Vide* PRACTICE.DEPOSITORS IN SAVINGS' BANK,—*Vide* SAVINGS' BANK.

DESCENTE SUR LES LIEUX.—*Vide* DROIT DE VUE.DISSOLUTION OF PARTNERSHIP.—*Vide* CONFESSION OF
JUDGMENT.DOMICILE.—*Vide* PLEADINGS

DOWER.

Held :—That under the 37th sec. of the 4th. Vic., Cap. 30, the dower to which children are entitled attaches :

1o. To lands, tenements, &c., in the possession of their father at the time of his decease :

2o. To lands, tenements, &c., which have been in the possession of the father, and in relation to which the mother has not barred or released her dower, under the provisions of the 35th section of the statute above cited.

Adams vs. O'Connell.

Jugé :—Qu'en vertu de la 37me sec. de la 4me. Vic., Chap. 30, le douaire des enfants se prend :

1o. Sur les terres, propriétés, etc., en la possession du père à l'époque de son décès :

2o. Sur les terres, propriétés, etc., qui ont été dans la possession du père, et par rapport auxquelles la mère n'a pas déchargé ou éteint son douaire, en vertu des dispositions de la 35me section du statut ci-dessus cité.

365

DROIT DE VUE.—DESCENTE SUR LES LIEUX.

In an action brought by the proprietor of a lot in the city of Montréal, against adjoining proprietors, to oblige them to close up an opening alleged to be in their gable wall having a *vue droite* upon the plaintiff's premises, it appeared that the lower story of the defendant's house was at about nine feet from an old division fence between the respective properties, but that the second story recently built came up to the division fence, with a passage underneath from the street. No opening was found in the second story looking into the plaintiff's lot, but beneath, and between it and the top of the fence, was an opening which looked directly upon it.

Held :—1o. That the opening was contrary to the 202d. article of the Custom of Paris.

2o. That the judge, in a case of this description, will make a *descente sur les lieux* when requested by the parties.

Robert vs. Davis.

Dans une action portée par le propriétaire d'un terrain dans la cité de Montréal, contre des propriétaires voisins, pour les obliger à fermer une ouverture qu'il disait exister dans leur pignon, et qui avait vue droite sur la propriété du demandeur, il fut constaté que l'étage inférieur de la maison des défendeurs était à environ neuf pieds d'une ancienne clôture de division entre les propriétés des parties, mais que le second étage récemment érigé venait jusqu'à la clôture de division, avec un passage en dessous. Il n'y avait aucune ouverture dans le second étage ayant vue sur le terrain du demandeur, mais au dessous, et entre cet étage et le haut de la clôture, il y avait une ouverture qui avait vue sur le terrain.

Jugé :—1o. Que l'ouverture était en contravention à l'article 202 de la Coutume de Paris.

2o. Que le juge, en pareil cas, fera une *descente sur les lieux* si il en est requis par les parties.

74

EVIDENCE.—*Vide* INSURANCE.—PRACTICE.—PROMISSORY NOTE.—

SEPARATION DE CORPS ET DE BIENS —VERDICT.

EVIDENCE.—FAITS ET ARTICLES.—REVENDEICATION.

1. Held :—In an action *en reven-dication* of moveables :

1o. That the son of the plaintiff, is not a competent witness for his father.

2o. That where a party is asked on interrogatories *sur faits et articles* whether he has not received the originals of certain letters, addressed to him by the adverse party in the suit, it is irregular to produce other letters not inquired of.

3o. That where goods are seized by revendication on the premises formerly occupied by the plaintiff and defendant as copartners, and no proof is made of a demand or of a refusal to deliver them up, and the goods are delivered to the plaintiff under an interlocutory order of the Court, the defendant alleging by his plea that he never claimed the goods, and praying *acte* of his willingness to deliver them ; the plaintiff's action will be dismissed with costs, it appearing that the seizure was made without necessity.

Jugé :—Dans une action en re-vendication de meubles :

1o. Que le fils du demandeur, est incompetent comme témoin pour son père.

2o. Que lorsqu'il est demandé à une partie par interrogatoires *sur faits et articles* s'il n'a pas reçu les originaux de certaines lettres, à lui adressées par la partie adverse dans la cause, il est irrégulier de produire d'autres lettres dont il n'est pas question.

3o. Que lorsque des effets sont saisis-revendiqués sur les lieux ci-devant occupés par le demandeur et le défendeur comme associés, et que nulle preuve n'est faite d'une demande ou d'un refus de les livrer, et que les effets sont remis au demandeur en vertu d'un jugement interlocutoire de la Cour, le défendeur alléguant par son plaidoyer qu'il n'a jamais réclamé les effets, et demandant acte de ce qu'il est prêt d'en faire la livraison ; l'action du demandeur sera renvoyée avec dépens, en autant qu'il appert que la saisie a été faite sans nécessité.

Hearle and Date.

290

Onus probandi.

2. An opposant, resident in Scotland, filed an opposition in 1859, as legatee under a will by which the testator bequeathed to her "the sum of £50 sterling, annually, during her natural life," claiming to be paid out of the proceeds of the sale of a farm left by the testator, but sold by sheriff's sale after his death for the debt of his son, one of the universal legatees.

The report or *projet de distribution*, by which the opposant was allowed to rank for a part of the sum, was contested by the defendant, widow of one of the universal lega-

Une opposante, résidant en Ecosse, produisit une opposition en 1859, comme légataire en vertu d'un testament par lequel le testateur lui léguait "la somme de £50 sterling, annuellement, pendant sa vie durant," réclamant son legs sur les deniers provenant de la vente d'une terre délaissée par le testateur, vendue par décret après son décès par les créanciers de son fils, un des légataires universels.

Le rapport ou *projet de distribution* par lequel l'opposante était colloquée pour partie de la somme réclamée, fut contestée par la défenderesse, veuve de l'un des légataires

tees, and tutrix to her minor children, on the ground that the opposant had never lived in this country, and that she was dead before the death of the testator, who died in 1842.

The answer to this was general and no evidence was adduced on either side:

Held:—In the Superior Court, Montreal:—That the *onus probandi* of the death of the opposant lay on the contesting party who had alleged it.

In appeal:—That it was the duty of the opposant to establish her existence.

Bonacina and McKintosh.

universels, et tutrice de ses enfants mineurs, par la raison que l'opposante n'avait jamais résidée dans ce pays, et qu'elle était morte dès avant le décès du testateur, qui était arrivé en 1842.

La réponse à cette contestation était générale et il ne fut produit aucune preuve de part ou d'autre:

Jugé:—Dans la Cour Supérieure, Montréal:—Que l'*onus probandi*, du décès de l'opposante incombait sur la partie qui l'avait allégué.

En appel:—Qu'il incombait à l'opposante d'établir son existence.

327

Possession.

8. The defendant, in a petitory action, pleaded possession of the land in dispute by himself and his *auteurs*, and the prescription of 30 years, without alleging in his plea, or producing at *enquête*, any title in his favor, or in favor of his *auteurs*:

Held:—That, under the circumstances of the case, verbal evidence was sufficient to connect the possession of the defendant with the parties previously in possession, as his *auteurs* and predecessors.

Stoddart vs. Lefebvre.

Le défendeur, dans une action pétitoire, plaida possession de la propriété en litige tant par lui-même que par ses auteurs, et la prescription de 30 ans, sans alléguer dans son plaidoyer, et sans produire à l'enquête, aucun titre en sa faveur, ou en faveur de ses auteurs:

Jugé:—Que, dans l'espèce, la preuve testimoniale était admissible pour établir connexité entre le défendeur et les parties antérieurement en possession, comme ses auteurs et prédécesseurs.

286

Witness.

4. That under the statute 23 Vic. cap. 57, sec. 51, a co-defendant may be examined as a witness by another co-defendant.

Jugé:—Qu'en vertu du statut de la 23^{ème} Vic., cha. 57, sec. 51, un co-défendeur peut être examiné comme témoin par un autre co-défendeur.

David vs. McDonald.

116

EXECUTION.—MOVEABLES.—IMMOVEABLES.

Held:—10. That the immoveable property of the defendant may be seized at the same time as his moveables, but his moveables must be first sold.

20. That where the return of the bailiff sets forth that the defendant has no moveables, proceedings to

Jugé:—10. Que la propriété immobilière d'un défendeur peut être saisie en même temps que ses meubles, mais ses meubles doivent être vendus d'abord.

20. Que lorsque le retour de l'huissier énonce que le défendeur n'a pas de meubles, une procédure

set aside this return must be taken before an opposition can be filed to set aside the seizure of the immoveable property, on the ground that the moveables should be first seized and sold.

Paige vs. Savard.

pour faire mettre de côté ce retour doit être adoptée avant qu'une opposition ne soit enfilée à la saisie de ses propriétés immobilières, fondée sur ce que ses meubles eussent dû être saisis et vendus d'abord.

3

EXPERTS.—PAYMENT OF.

Held:—That an *expert* appointed by the Court, at the suggestion of one of the parties to a suit, can only look to the party so procuring his appointment for payment of his services as such *expert*.

Brown and Wallace.

Jugé:—Qu'un expert nommé par la Cour, à la suggestion de l'une des parties dans une cause, ne peut réclamer ses émoluments que de la partie qui a procuré sa nomination.

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FAITS ET ARTICLES.—*Vide EVIDENCE.*

FEEs.—*Vide PRESCRIPTION.—SHERIFF.*

FEEs.—PROTHONOTARY.

Held:—That, in the case submitted, the prothonotary had no right, under the then existing tariff, to the entrance fee upon a petition filed under the 23 Vict., cap. 57, sec. 52.

Ex parte—Langlois.

Jugé:—Que, dans l'espèce, le protonotaire n'avait pas droit sous le tarif existant alors, à l'honoraire d'entrée sur une requête produite en vertu de la 23 Vict., cap. 57, sec. 52.

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FIGURES.—*Vide PLEADINGS.*

FIRE DEBENTURES.—*Vide MORTGAGE.*

FORGERY.—*Vide PROMISSORY NOTE.*

FREE AND COMMON SOCCAGE.—*Vide MORTGAGE.*

GARANTIE.—HYPOTHEQUE.—SOLIDARITE.

The defendant in an hypothecary action brought an action *en garantie* against four only out of six of his vendors, liable under their deed of sale for a *garantie* against the claim of the principal plaintiff; the action *en garantie* was discontinued as to one of the defendants *en garantie*.

Held:—1o. That under the deed of sale each co-vendor sold only his own share, or *portion héréditaire*, in the succession of his ancestor, and was only liable to the extent of

Le défendeur dans une action hypothécaire porta une action *en garantie* contre quatre de ses six vendeurs, responsables *en garantie* en vertu de leur acte de vente de la réclamation du demandeur principal; l'action *en garantie* fut discontinuée quant à l'un des défendeurs *en garantie*.

Jugé:—1o. Que sous l'acte de vente chaque co-vendeur vendait seulement sa propre part, ou *portion héréditaire*, dans la succession de son ancêtre, et n'était responsable

such share in the action *en garantie*, the obligation of *garantie* being divisible *quoad damnationem*, and the three defendants *en garantie* were condemned to indemnify the plaintiff *en garantie* to the extent of one half of the hypothecary debt, being one sixth for each defendant, with costs of the principal demand, and costs on the demand *en garantie* only up to the filing of the plea, inasmuch as the defendants offered by their plea to allow judgment to go against them for one half of the sum mentioned in the principal action.

20. That the *hypothèque* is indivisible in so far as respects the immoveable hypothecated.

McCarthy vs. Senécal and Senécal vs. Bonneau.

41

GARNISHEE.—*Vide SAISIE-ARRÊT.*

GUARDIAN,—RESPONSIBILITY OF.

The defendant, Cowan, became the guardian of effects seized at the instance of Berry, under a writ of *saisie-arrêt simple* in a cause wherein he was plaintiff, and one May, defendant; subsequently the same effects were seized and sold, under a writ of *feri facias* issued at the instance of one Tremain; thereupon the plaintiff brought his action against the defendant, praying that the defendant should be held to produce the effects, or to pay the value thereof.—To this action the defendant demurred, and upon this demurrer it was:—

Held:—That if, under the circumstances of the case, the plaintiff had any right to exercise against the defendant, he could not do so by direct action against the defendant, his remedy being by a motion for attachment in the cause wherein he had been appointed guardian, to compel him to produce the effects, or to pay their value.

Berry vs. Cowan.

dans une action *en garantie* que jusqu'à concurrence de telle part, l'obligation de *garantie* étant divisible *quoad damnationem*, et les trois défendeurs *en garantie* furent condamnés à indemniser le demandeur *en garantie* jusqu'à concurrence de la moitié de la dette hypothécaire, étant un sixième pour chaque défendeur, avec dépens de la demande *en garantie* jusqu'à l'enfilure du plaidoyer, en autant que les défendeurs par tel plaidoyer avait fait offre de consentir à ce que jugement fut rendu contre eux pour moitié de la somme réclamée par l'action principale.

20. Que l'*hypothèque* est indivisible en autant qu'il s'agit de l'immeuble hypothéqué.

Le défendeur, Cowan, devint le gardien d'effets saisis à l'instance de Berry, en vertu d'un writ de *saisie-arrêt simple* dans une cause dans laquelle il était demandeur, et le nommé May, défendeur; subéquemment les mêmes effets furent saisis et vendus, en vertu d'un writ de *feri facias* émané à la poursuite d'un nommé Tremain; sur ce le demandeur institua son action contre le défendeur, concluant à ce que le défendeur fut condamné à représenter les effets, ou à en payer la valeur.—A cette action le défendeur plaida par défense aux fonds en droit, et sur cette défense il fut:—

Jugé:—Que si, dans les circonstances de la cause, le demandeur avait aucun droit à exercer contre le défendeur, ce ne pouvait être par action directe contre le défendeur, mais bien au moyen d'une règle pour contrainte dans la cause où il avait été constitué gardien, pour le contraindre à produire les effets, ou à en payer la valeur.

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HARBOUR COMMISSIONERS.—*Vide BEACHES.*

IMMOVEABLES, SEIZURE OF.—*Vide* EXECUTION.

IMPENSES,—GROSSES, UTILES, VOLUPTUAIRES.

Held:—1o. That, in the case submitted, the usufructuary can only recover from the proprietor the costs of the large repairs and of the repairs necessary for the preservation and enjoyment of the immoveables subject to the usufruct.

2o. The usufructuary can only claim the value of useful improvements in so far as the immoveables derive value from them at the time of the opening of the substitution.

3o. The large repairs and necessary improvements are payable in the entire, even though they should have ceased to exist at the opening of the substitution, provided they have not so ceased to exist by the fault of the usufructuary, and by reason of his want of care.

4o. That ornamental repairs are not payable by the proprietor.

La Fontaine vs. Suzor.

Jugé:—1o. Que, dans l'espèce, l'usufruitier ne peut répéter du propriétaire que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles sujets à l'usufruit.

2o. L'usufruitier peut réclamer les impenses utiles que jusqu'à concurrence de ce que les immeubles s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution.

3o. Les impenses grosses et nécessaires sont remboursables en entier, quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que l'usufruitier ne soit pas coupable de leur disparition par suite de son manque d'entretien.

4o. Les impenses voluptuaires ne sont pas remboursables.

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INDORSEMENT.—*Vide* PROMISSORY NOTE.INSCRIPTION.—*Vide* PRACTICE.

INSURANCE.—EVIDENCE.—REPRESENTATIONS.—WARRANTY.

1. Held:—1o. That letters written by the agent of the defendant, a Fire Insurance Co., to his principal, after the loss had accrued, cannot be used in evidence against the company.

2o. That contemporaneous representations made by the assured to other insurers of the same subject, may be legally proved by the defendants.

3o. That the loss under a policy stipulating: "That the loss or damages shall be estimated according to the true and actual cost value of the property at the time the loss shall happen," must be ascertained from proof of the money value of the subject in the existing market.

4o. That the following words written upon the face of the policy, "of the steamer Malakoff now lying in Tate's dock, Montreal, and intended to navigate the St. Law-

Jugé:—1o. Que des lettres écrites par l'agent de la défenderesse, une société d'assurance, à son principal, après la perte arrivée, ne peuvent être produites en preuve contre la compagnie.

2o. Que des représentations faites par la partie assurée à d'autres assureurs, peuvent être prouvées légalement par la défenderesse.

3o. Que la perte sous une police d'assurance stipulant: "Que la perte ou les dommages seront estimés d'après la vraie valeur des effets assurés lors de telle perte," doit être constatée par preuve de la valeur en argent de l'objet assuré sur les marchés.

4o. Que les mots suivants écrits sur la police d'assurance, "du vapeur Malakoff étant au bassin Tate, Montréal, et destiné à naviguer sur le St. Laurent et les Lacs de Hamil-

rence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter at a place to be approved of by the company, who will not be liable for explosions either by steam or gunpowder," is a warranty and not a representation.

50. That such warranty not having been complied with by the assured, the policy is void, and an action for the loss will be dismissed upon motion, *nonobstant veredicto*.

Grant vs. The Aetna Insurance Company.

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Policy of,—Covenants in.

2. Held :—10. That the proprietor of a house destroyed by fire, and insured, can insist strictly upon the clause contained in the policy of insurance, that the works shall be seen and examined by *experts*, and that so long as the insurance company shall not have complied with this condition, even for inconsiderable works, the proprietor is not bound to receive his house in that state, and can sue the insurance company to compel it to surrender the possession of the premises in the state in which they ought to be, and after compliance with the condition of an *expertise*.

20. That the circumstance of the proprietor having during reconstruction made suggestions to the builder as to the manner of such reconstruction, or as to the division of the house, cannot be interpreted so as to deprive him of his right to an *expertise*.

Allyn vs. The Quebec Fire Assurance Company.

394

Policy of,—Evidence.

3. Held :—That, in the case submitted, inasmuch as the appellants could only become liable to a party insured by a regular policy of insurance in writing, and the judgment rendered against them, (founded upon the verdict of a jury)—resting upon oral evidence of the insurance, having been reversed, the parties were bound again to submit the case to a jury.

The Montreal Assurance Company and McGillivray.

325

ton à Québec, principalement comme bateau à fret, et qui sera mis en hivernement dans un endroit qui sera approuvé par la compagnie, laquelle ne sera pas responsable pour explosion par la vapeur ou par la poudre," constituent une garantie et non une représentation.

50. Que l'assuré ne s'étant pas conformé à cette garantie, la police est nulle, et une action pour la perte sera renvoyée sur motion, *nonobstant veredicto*.

Jugé :—10. Que le propriétaire d'une maison incendiée, et assurée, peut insister strictement sur la clause contenue en la Police d'assurance, que les ouvrages seront vus et visités par experts, et que tant que la Compagnie d'Assurance ne se sera pas conformée à cette condition, même pour des ouvrages peu considérables, le propriétaire n'est pas tenu de recevoir sa maison en cet état, et peut poursuivre la Compagnie d'Assurance pour l'obliger à lui rendre la possession d'icelle en l'état où elle doit être, et après l'observation de la condition d'une expertise.

20. Que le fait que le propriétaire pendant la reconstruction aurait fait à l'ouvrier des suggestions sur la manière de reconstruire, ou sur la division des appartements, ne peut être interprété contre lui comme une renonciation à son droit d'une expertise.

Jugé :—Que, dans l'espèce, les appelants ne pouvant être liés envers un assuré qu'en vertu d'une Police écrite et régulière, et le jugement prononcé contre eux, (conformément au verdict d'un jury) fondé sur simple preuve verbale de l'assurance, ayant été infirmé, les parties devaient subir une nouvelle éprouve devant un jury.

Profits.

4. Held:—That an insurance Company is liable to a party whose stock in trade is insured by them, for the actual market value of such stock at the time of the loss by fire; and not for the cost price thereof, or the sum which it may have cost the party insured to manufacture such stock, notwithstanding that the assured had not insured his profits upon the subject insured.

Jugé:—Qu'un assuré a droit de recouvrer d'une compagnie d'assurance qui a assuré son fonds de commerce, la valeur de tel fonds sur les marchés lors de sa destruction par le feu; et non seulement le prix coûtant d'icelui, ou la somme que la confection des effets peut avoir coûté à l'assuré, nonobstant que les profits sur l'objet assuré n'eussent pas été assurés.

The Equitable Fire Insurance Company and Quinn.

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Warranty.

5. In a policy of insurance against fire, of the 30th July, 1853, there was a clause whereby it was stated that the Company defendant—"do insure B. G. (the plaintiff) against loss or damage by fire to the amount of \$4000, on the steam-boat Malakoff now lying in Tait's dock, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place to be approved of by the Company."

The vessel was burnt on the 25 June, 1859, during the continuance of the policy, in Tait's dock, she never having left the dock:

Held:—That whether the clause above cited was considered as a warranty or not, no action could be maintained against the Company, the vessel never having left the dock.

Dans une police d'assurance du 30 juillet 1853, il y avait une clause par laquelle il était stipulé que la compagnie défenderesse—"assure B. G. (le demandeur) contre toute perte ou dommage par le feu au montant de \$4000, sur le vapeur *Malakoff*, maintenant dans le dock de Tait, et destiné à naviguer le St. Laurent et les Lacs, de Hamilton à Québec, principalement pour le transport de fret, et pour être mis en hivernement dans un endroit qui sera approuvé par la compagnie."

Le vaisseau fut incendié le 25 juin, 1859, dans le dock de Tait, pendant que la police était en force, le vaisseau n'étant jamais sorti du dock:

Jugé:—Que la clause ci-dessus fût considérée comme une garantie ou non, aucune action ne pouvait être maintenue contre la Compagnie, le vaisseau n'étant jamais sorti du dock.

Grant and The Aetna Insurance Company.

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*JUDGMENT.—Fide PLEADINGS.**JUDGMENT OF CONFIRMATION.—Fide LEGACY.**JUDGMENT NONOBTANTE VEREDICTO.—Fide VERDICT.**JURISDICTION.—Fide CONVICTION.—SEAMEN'S WAGES.*

JURISDICTION.

The defendant resided at Brantford in Upper-Canada, the plaintiffs impleaded him in the Superior Court at Montreal, the action being commenced by a writ of *saisie-arrest* in the hands of The Phoenix Assurance Company; the defendant, upon being called in under the 12th Vic., cap. 38, sec. 94—appeared by attorney, and pleaded by *exceptions déclatoire* and *à la forme*.

Held:—That the garnishees at the time of the service of the writ of *saisie-arrest* upon them being indebted to the defendant in a certain sum of money, the plaintiffs had a right to sue the defendant in the district of Montreal, and that both exceptions must be dismissed.

Le défendeur résidait à Brantford dans le Haut-Canada, les demandeurs le poursuivirent dans la Cour Supérieure à Montréal, l'action fut commencée par un writ de *saisie-arrest* entre les mains de la Compagnie d'Assurance le Phoenix; le défendeur ayant été sommé sous les provisions de la 12^{ème} Vic., chap. 38, sec. 94, comparut par procureur et plaida par *exceptions déclatoire* et *à la forme*.

Jugé:—Que les tiers-saisis lors du service du writ sur eux étant endettés au défendeur en une certaine somme d'argent, les demandeurs avaient droit de poursuivre le défendeur dans le district de Montréal, et que les deux exceptions devaient être déboutées.

Chapman vs Nimmo and The Phoenix Assurance Co.

90

JUSTIFICATION.—*Vide* PLEADINGS.LEGACY.—*Vide* DELIVRANCE DE LEGS.—WILL.

LEGACY.—CHILDREN AND GRAND CHILDREN.—WILL.

1. Held:—1o. That, in the case submitted, the terms children still living, comprehend the grand children descendants *en ligne directe* of the testatrix, and that by right of representation the said grand children hold directly under their great grand-mother, and not from their mother, their right to the legacy of the immoveable property by them claimed.

2o. That the only effect of judgments of confirmation is to do away with mortgages, without in any manner fortifying the title deed the ratification of which is demanded, which deed, notwithstanding such ratification, remains with all its imperfections.

Jugé:—1o. Que, dans l'espèce, les termes enfants alors vivants, comprennent les petits enfants, descendant en ligne directe de la testatrice, et que par droit de représentation les dits petits enfants tiennent directement de leur bisaleule, et non de leur mère, leur droit au legs de la propriété de l'immeuble par eux réclamé.

2. Que les lettres de ratification n'ont pour effet que de purger les hypothèques, sans aucunement fortifier le titre d'acquisition dont la ratification est demandée, lequel, nonobstant telle ratification, reste avec toutes ses défectuosités et tous ses vices.

Glackemeyer vs. The Mayor, &c. of the City of Quebec, and Lagueux.

18

Confessor.

2. Held :—10. That a confessor may receive a legacy from his penitent.

20. That any disabilities which may have existed with regard to the confessor in such case, under the old French law, have been removed by the act 41st. Geo. III, cap. 4.

Jugé :—10. Qu'un confesseur peut recevoir un legs de son pénitent.

20. Que toutes restrictions qui ont pu exister à l'égard du confesseur en pareil cas, sous le régime du droit Français, ont été levées par l'acte de la 41me. Geo. III, chap. 4.

Harper vs. Bilodeau.

119

LESSOR AND LESSEE.—ACTION EN GARANTIE.

Held :—That where a tenant is sued by his sub-tenant for damages suffered by reason of the premises leased not being wind and water tight, an action *en garantie* lies against the lessor by the tenant, although the lease between them contains a clause that the tenant shall not sublet without the consent of the lessor, and the tenant notwithstanding sublets without such consent, but afterwards the lessor receives from him the extra premium of insurance caused by such subletting, the sub-tenant being a *tavern-keeper*.

Jugé :—Que lorsqu'un locataire est poursuivi par son sous-locataire pour dommages résultants de ce que les lieux loués ne sont pas clos et couverts, le locataire a droit d'action en garantie contre le locateur, quoiqu'il y ait clause dans le bail entr'eux que le locataire ne sous-louera pas sans le consentement du locateur, et quoique le locataire ait fait sous-bail sans tel consentement, le locateur cependant plus tard recevant de lui l'extra premium d'assurance résultant de tel sous-bail, le sous-locataire étant un aubergiste.

Thèberge vs. Hunt.

179

LIABILITY.—*Vide SAVINGS' BANK.*

LIEN.—*Vide SHERIFF.*

LOCAL WORK.—*Vide MUNICIPALITY.*

MILLS.—*Vide SEIGNIORIAL RIGHTS.*

MORTGAGE.—*Vide GARANTIE.*

MORTGAGE.—*FIRE DEBENTURES.*

1. Held :—That the general mortgage given to the Crown by the 18th section of the 9th Vict., cap. 62, for advances under that act, attaches without registration, although the loan was made after the borrower had rebuilt, and was not applied as contemplated.

Jugé :—Que l'hypothèque générale donnée à la Couronne par la 18me section de la 9me Vict., chap. 62, pour avances en vertu de cet acte, est valide sans enregistrement, quoique le prêt ait été fait après que l'emprunteur eut rebâti, et n'ent pas été appliqué tel qu'il était compris.

Lavoie and Regina.

63

Special Mortgage.—Free and Common Soccage.

2. Held :—That, in the case submitted, it was not necessary that the appellant, an opposant in the Court below, should allege that the property upon which she claimed a right of special mortgage, created in 1848, was held in free and common soccage; and that to set aside the collocation of the respondent, also an opposant in the Court below, and who had been ranked before her, it was only necessary to allege the fact in question in her exception to the opposition of the respondent; and that notwithstanding that such fact had not been alleged in her opposition, and did not appear from any part of the record, nevertheless she was entitled to the costs of her contestation, which had been denied her in the Court below.

Jugé :—Que, dans l'espèce, il n'était pas nécessaire que l'appellante, une opposante en Cour inférieure, alléguât que la propriété sur laquelle elle réclamait une hypothèque spéciale, créée en 1848, était tenue en franc et commun soccage; et que pour faire mettre de côté la collocation de l'intimé, aussi un oppsant en Cour inférieure, qui avait été colloqué à son préjudice, il était seulement nécessaire d'alléguer le fait en question dans son exception à l'opposition de l'intimé; et que nonobstant que ce fait n'eût pas été allégué dans l'opposition de l'appellante, et n'apparût d'aucune partie du dossier, néanmoins elle avait droit aux frais de sa contestation, lesquels lui avait été refusés par le tribunal de première instance.

Evans and Boomer.

465

*MOTION.—Vide PLEADINGS.**MUNICIPALITY.—Vide SCHOOL MUNICIPALITY.**MUNICIPALITY.—SALE OF LANDS.—ROAD-WORK.—BY-LAW.*

1. Held, in the Superior Court, St. Hyacinthe :—That the Superior Court has no jurisdiction to amend, alter, revise or disallow any by-law of a municipal corporation, although passed illegally, and contrary to the just rights of the parties interested, unless redress is sought under the 12th Vic., ch. 41.

Jugé, dans la Cour Supérieure, St. Hyacinthe :—Que la Cour Supérieure n'a aucune juridiction pour amender, changer, reviser ou rejeter aucun règlement d'une corporation municipale, quoique passé illégalement, et en contravention aux justes droits des parties intéressées, à moins que ce ne soit en vertu des dispositions de la 12me Vict. ch. 41.

In appeal :—1o. That under "The Lower Canada Municipal and Road Act of 1855," a municipal council is not authorized to cause a sale by auction, *au rabais*, to be made of the road work of a proprietor of lands, within the municipality, and to cause such lands to be sold, after notice in the *Canada Gazette*, for the price of the making of such road, without judicial proceedings.

En appel :—1o. Que sous "l'Acte des municipalités et des chemins du Bas-Canada de 1855," un conseil municipal n'est pas autorisé à vendre publiquement, *au rabais*, les travaux des chemins qu'un propriétaire de terres est tenu de faire dans la municipalité, et de faire vendre ses terres pour le coût de tels chemins, après avis dans la *Gazette du Canada*, mais sans procédés judiciaires

2o. That the proprietor of such lands has a right of action in the

2o. Que le propriétaire de telles terres a un droit d'action dans la

Superior Court to prevent the corporation from so illegally advertizing and selling his lands.

30. That, in such action, the Court will declare the advertizements in the *Canada Gazette* illegal, and condemn the corporation to desist from troubling the plaintiff in the possession and enjoyment of his lands, by causing the sale thereof to be made without judicial authority, and to nominal damages for its illegal acts.

McDougall and Corporation of the Parish of St. Ephrem d'Upion.

Cour Supérieure pour empêcher la corporation d'annoncer et vendre ses terres illégalement.

30. Que, dans telle action, la Cour déclarera les annonces dans la *Gazette du Canada* illégales, et condamnera la corporation à ne point troubler le demandeur dans la possession et jouissance de ses terres, en les faisant vendre sans aucune autorité de justice, et aussi en dommages nominaux pour ses actes illégaux.

353

County work.—Local work.

2. Held:—That the making and maintaining of a street is not a "county work" within the meaning of the 2d. sub-section of the 39th section of the Lower Canada Municipal and Road Act of 1855, but is a "local work" within the meaning of the third sub-section of the same section, for which the county council cannot levy a rate.

Jugé:—Que la confection et le maintien d'une rue n'est pas un "ouvrage de comté" d'après les termes de la 2me sous-section de la 39me sec. de l'acte des Municipalités et Chemins de 1855, mais est un "ouvrage local" aux termes de la 3me sous-section de la même section, pour lequel un conseil de comté ne peut prélever une taxe.

Grand Trunk R. R. Co. and Corporation of Lévis.

57

NOTICE OF MOTION.—FIDE PLEADINGS.

NOVATION.—PROMISSORY NOTE.—PRIVILEGE.

Held:—10. That promissory notes signed by the debtor, and payable to the creditor's order, do not, if dishonored at maturity, effect a novation of the debt for the payment of which they are given, if the intention to novate be not clearly expressed by the creditor at the time of their reception.

20. That the words *dont quit-tance*, in a deed of sale, do not express any intention to novate under such circumstances.

30. That the vendor of a chattel sold, for part of the price of which he has received the vendee's promissory notes, payable to his order, is, if any of such promissory notes be dishonored at maturity, privileged, on production of such promissory notes, upon the proceeds of the chattel sold in his debtor's pos-

Jugé:—10. Que des billets promissaires signés par le débiteur, et payables à l'ordre du créancier, n'opèrent pas, s'ils ne sont payés à l'échéance, une novation de la dette en paiement de laquelle ils ont été donnés, si l'intention de faire novation n'est clairement exprimée par le créancier lors de leur réception.

20. Que les mots *dont quit-tance*, dans un contrat de vente, n'expriment pas dans telles circonstances l'intention de faire novation.

30. Que le vendeur d'une chose, pour partie du prix de laquelle il a reçu les billets promissaires de l'acheteur, payables à ordre, a un privilège si aucuns des dits billets ne sont pas payés à échéance, sur le produit de la vente judiciaire de la chose vendue en la possession du débiteur, sur production de tels

session under a writ of execution, for that portion of the original price represented by such promissory note or notes so dishonored and produced.

40. That neither the exercise by the vendee of rights of property over the article sold, nor the making of repairs thereto, will defeat the privilege of the vendor, so long as the identity of the article can be established.

Noad and Lampson.

billets, pour cette portion du prix représentée par tel billet ou billets ainsi produits et non payés.

40. Que ni l'exercice par l'acquéreur du droit de propriété sur la chose, ni le fait qu'il a réparé cette chose ne détruiront le privilège du vendeur, tant que l'identité de l'objet peut être constatée.

29

OBLIGATION,—RIGHT TO RECOVER AMOUNT OF.

Held:—That in an action upon an obligation, in the case submitted, the plaintiff can only recover the amount of money actually received by the defendant, and not the amount named in the obligation.

Belleau vs. Dégourdelle.

Jugé:—Que dans une action sur une obligation, le demandeur ne peut, dans l'espèce, recouvrer que le montant réellement perçu par le défendeur, et non le montant porté à l'obligation.

166

OWNER OF VESSEL.—*Vide* SEAMEN'S WAGES.

PACTE COMMISSOIRE.—TRANSACTION.

In 1852, the plaintiff and her sister sold to the defendant certain property for a life rent, the deed contained a *pacte comissoire* or clause to the effect that if the defendant failed to make payment of the life rent, the vendors would be entitled to procure the setting aside of the sale, and to resume the possession of the property. In 1857, the defendant having failed to make payment of the rent, and being then eight quarters in arrear, the parties to the deed of 1852 made another by which the defendant retroceded to the plaintiff and her sister a certain portion of the property sold by the deed of 1852—the deed of 1857 provided that the vendors should retain their mortgage and privilege of *bailleur de fonds* under the said deed of 1852, and that the defendant should assign to them the rents, issues &c., of the property left him. In 1859, the defendant having again failed to make payment of the rent due as fixed by the deed of 1857, and the plaintiff having brought her

En 1852, la demanderesse et sa sœur vendirent au demandeur certaine propriété à rente viagère, l'acte contenait un *pacte comissoire* par lequel il était stipulé que si le défendeur faisait défaut de payer la rente viagère, les vendeurs auraient droit de faire rescinder la vente, et de rentrer en possession de la propriété. En 1857, le défendeur ayant fait défaut de payer la rente, et étant arriéré de huit quartiers, les parties à l'acte de 1852 en firent un autre par lequel le défendeur rétrocéda à la demanderesse et à sa sœur une certaine portion de la propriété vendue par l'acte de 1852—par l'acte de 1857, il était pourvu que les vendeurs conserveraient leur hypothèque et privilège de bailleur de fonds en vertu du dit acte de 1852, et que le défendeur leur transporterait les loyers et revenus des propriétés qui lui restaient. En 1859, le défendeur ayant de nouveau fait défaut de payer la rente viagère aux termes de l'acte de 1852, et la demanderesse ayant porté son action en rescision

action to rescind the deed of 1852, under the *pacte comissoire* contained therein :

Held:—That the covenant or *pacte comissoire* contained in the deed of 1852 had ceased to exist by reason of the *transaction* contained in the deed of 1857.

Evans vs Smith.

de l'acte de 1852, en vertu du *pacte comissoire* y contenu :

Jugé:—Que le *pacte comissoire* ou clause contenue dans l'acte de 1852 avait cessé d'exister en raison de la *transaction* contenue dans l'acte de 1857.

337

PAROL EVIDENCE.—*Vide* EVIDENCE.—PROMISSORY NOTE.

PARTNER.—*Vide* CONFESSION OF JUDGMENT.

PAYMENT.—*Vide* PRESCRIPTION.—VERDICT,—INTERPRETATION OF.

PEREMPTION D'INSTANCE.

1. Held:—That the *péremption d'instance* cannot be invoked in the case of an opposition filed by an hypothecary creditor in a proceeding for a ratification of title, there being no *instance* pending.

Jugé:—Que la *péremption d'instance* ne peut être invoquée dans le cas d'une opposition produite par un créancier hypothécaire dans une procédure pour jugement de confirmation, en autant qu'il n'y a pas *instance* pendante.

Ex parte—Robertson, for Ratification of title, and Pollock.

285

Costs.

2. Held:—That upon sufficient cause shewn by affidavit, the Court will not grant costs on *péremption d'instance*.

Jugé:—Que sur cause suffisante établie par affidavit, la Cour n'accordera pas de frais sur *péremption d'instance*.

De Bleury vs. Gauthier.

494

PHYSICIAN.—*Vide* PRESCRIPTION.

PILOT.—*Vide* COLLISION.

PLEA TO THE MERITS.—*Vide* PLEADINGS.

PLEADINGS.—DOMICILE.—JUDGMENT.—WITNESS.

1. Held:—1o. That it is not necessary that the declaration annexed to the writ should contain the domicile and addition of the parties.

2o. That, in the case submitted, the plaintiff still had his domicile in the city of Quebec.

3o. That it is not absolutely necessary, although it is desirable, that the judgment should be rendered by the judge who hears the evidence; this matter having been left to the discretion of the judges holding the Superior Court.

Jugé:—1o. Qu'il n'est pas nécessaire que la déclaration annexée au writ contienne le domicile et les qualités des parties.

2o. Que, dans l'espèce, le demandeur avait encore son domicile dans la cité de Québec.

3o. Qu'il n'est pas absolument nécessaire, quoique désirable, que le jugement soit rendu par le juge qui a entendu les témoignages; cette matière ayant été laissée à la discrétion des juges siégeant en Cour Supérieure.

40. That the making of an order that all the witnesses shall withdraw, except the one under examination, is not demandable of strict right.

Gugy and Donaghue.

40. Qu'une partie n'a pas strictement le droit de demander qu'il soit ordonné que tous les témoins se retireront, à l'exception de celui qui subit son examen.

421

Figures.

2. Held:—That where in a declaration the amount demanded is in *figures*, an exception to the form will lie, and the action dismissed on such exception, although the action be non-appellable.

Rivet vs. Poisson.

Jugé:—Que lorsque dans une déclaration le montant demandé est en *chiffres*, une exception à la forme sera déclarée bien fondée, quoique l'action soit non appellable.

493

Argumentative plea.—Justification.—Slander.—Costs.

3. Held:—10. That a plea by way of exception will not be rejected because it is argumentative, or because facts are set forth in such plea which could have been given in evidence under the general issue.

20. That a plea in the nature of a plea of justification, in an action of slander, will not be dismissed because it does not contain an admission of the use of the words intended to be justified.

30. That an attorney, a party to an action, conducting his own cause, cannot recover fees from the adverse party as if he were acting as the attorney of another person.

Jugé:—10. Qu'un plaidoyer par forme d'exception ne sera pas rejeté parce qu'il est argumentatif, ou parce que des faits sont allégués dans tel plaidoyer qui auraient pu être prouvés sous une défense aux fonds en fait.

20. Qu'un plaidoyer de justification, dans une action pour injures verbales, ne sera pas rejeté parce qu'il ne contient pas une admission que les paroles que l'on entend justifier ont été proférées.

30. Qu'un procureur, partie à une action, conduisant sa propre cause, ne peut recouvrer ses honoraires de la partie adverse de même que s'il agissait comme procureur d'une autre personne.

Gugy and Ferguson.

409

Motion.—Notice of motion.

4. Held:—That where a party is required to proceed "by motion," a notice of motion is equivalent to moving the Court, although such notice of motion be given on a day upon which the Court is in session and during the term—and that such notice of motion has the effect of a rule *nisi*.

Secrelun vs. Foote.

Jugé:—Que dans les cas où il est nécessaire qu'une partie procède "par motion," un avis de motion équivaut à une motion faite Cour tenante, quoique tel avis de motion soit donné pendant les séances de la Cour et pendant le terme—et que tel avis de motion a l'effet d'une règle *nisi*.

497

Plea to the merits.

5. Held:—That a defendant foreclosed from pleading and afterwards allowed on affidavit "to file a plea

Jugé:—Qu'un défendeur forcé du droit de plaider et auquel il est subséquemment permis sur affidavit

to the merits," on payment of costs, may file a plea denying the fraud and *déconfiture* set up by the plaintiff, and that such plea will be deemed a plea to the merits.

"de produire un plaidoyer aux mérites," peut enfilier un plaidoyer déniaut la fraude et la déconfiture invoquées par le demandeur, et que tel plaidoyer sera considéré comme un plaidoyer aux mérites.

Leeming vs. Robertson.

492

POLICY OF INSURANCE.—*Vide* INSURANCE.

POSSESSION.—*Vide* EVIDENCE.

POWER OF ATTORNEY.—*Vide* AGENT.

PRACTICE.—*DEMANDER*.—EVIDENCE.

1. The plaintiff leased to the defendant for several years, certain premises for the sum of £570, the receipt whereof was acknowledged. The action brought was to have the leases set aside as fraudulent, the plaintiff alleging that the only amount which had ever been paid him was £37; that the contracts were usurious, and that there was *lésion d'outre moitié*.—The defendant pleaded a *défense au fonds en droit*.

Held:—That the parties must proceed to proof before adjudication on the *défense au fonds en droit*.

Le demandeur loua au défendeur pour plusieurs années, certaines propriétés pour la somme de £570, que le demandeur reconnut avoir reçue. L'action portée était afin d'obtenir la résiliation des baux comme frauduleux, le demandeur alléguant que le seul montant qui lui avait été payé était £37; que les contrats étaient entachés d'usure, et qu'il y avait lésion d'outre moitié.—Le défendeur plaida une défense au fonds en droit.

Jugé:—Que les parties devaient procéder à la preuve avant faire droit sur la défense au fonds en droit.

Perrault vs. Malo.

81

Inscription for proof and hearing.

2. Held:—That an inscription for proof and for hearing on the merits of an exception of prescription, and sale of litigious rights, is irregular, it being a partial inscription, made without leave of the Court.

Jugé:—Qu'une inscription pour preuve et audition aux mérites sur une exception de prescription, et de vente de droits litigieux, est irrégulière, icelle étant une inscription partielle, faite sans la permission de la Cour.

Lionnais and Guyon dit Lemoine.

73

Proceedings.

3. The parties, plaintiff and defendant, having proceeded in the Circuit Court, in an appealable case, as if the case were non-appealable, and judgment having been rendered in favor of the plaintiff, it was:

Les parties, demanderesse et défenderesse, ayant procédé dans la Cour de Circuit, dans une cause sujette à appel, de même que si la cause eût été non sujette à appel, et jugement ayant été rendu en faveur du demandeur, il fut:

Held:—Upon an appeal instituted by the defendant, on the ground

Jugé:—Sur un appel interjeté par le défendeur, en raison de ce que

that the proceedings were irregular, the evidence not being in writing, and no articulation of facts or inscription for *enquête* or for hearing on the merits having been made, that the Court would not disturb the judgment of the Court below.

Osgood and Cullen.

les procédés étaient irréguliers, les témoignages n'ayant pas été pris par écrit, et aucune articulation de faits ou inscription pour *enquête* ou pour audition aux mérites n'ayant été faite, que la Cour n'infirmerait pas le jugement du tribunal inférieur.

282

PREScription.—ATTORNEYS' FEES.—PAYMENT.

1. Held:—1o. That by the statute 12 Vic., ch. 44, sec. 2, the prescription of the fees and disbursements of attorneys *ad lites* is not an absolute prescription, *fin de non recevoir*.

2o. That a plea invoking such prescription of five years will be dismissed upon demurrer, if by such plea the party does not allege payment and tender his oath.

Ross vs. Quinn.

Jugé:—1o. Que par le statut 12 Vict. ch. 44, sec. 2, la prescription des honoraires et déboursés des procureurs *ad lites* n'est pas une prescription absolue, *fin de non recevoir*.

2o. Qu'un plaidoyer invoquant cette prescription de cinq ans sera renvoyé sur *demurrer*, si par son plaidoyer la partie n'allègue pas paiement et n'offre pas son serment.

175

Physician.

2. Held:—That the prescription of five years enacted by the 10th and 11th Vic., cap. 26, sec. 16, is an absolute prescription, a bar to the action, *fin de non recevoir*, and is not a mere presumption of payment.

Bardy vs. Huot.

Jugé:—Que la prescription de cinq ans établie par la 10^{me} et 11^{me} Vic., cap. 26, sec. 16, est une prescription absolue, une *fin de non recevoir*, et n'est pas une simple présomption de paiement.

200

PRIVILEGE—*Vide* NOVATION.

PRIVY COUNCIL.—DECREE OF.—SUPERIOR COURT.

The plaintiffs with their petition produced a copy of a decree of Her Majesty in Her Privy Council, reversing a judgment of the Court of Queen's Bench, which confirmed a judgment of the Superior Court at Montreal, dismissing the plaintiffs' action. The judgment of the Privy Council ordered the Superior Court to cause judgment to be entered up for the original plaintiffs, which was prayed for by the petition.

Held:—1o. That the Superior Court must obey the order so given, and enter up judgment for the sum demanded by the plaintiffs' declaration.

Les demandeurs avec leur requête produisirent copie d'un décret de Sa Majesté en son Conseil Privé, infirmant un jugement de la Cour du Banc de la Reine, qui confirmait un jugement de la Cour Supérieure à Montréal, renvoyant l'action des demandeurs. Le jugement du conseil privé ordonnait à la Cour Supérieure de rendre jugement pour les demandeurs originaires, ce qu'ils demandaient par la dite requête.

Jugé:—1o. Que la Cour Supérieure doit obéir à l'ordre ainsi donné, et rendre jugement pour la somme réclamée par la déclaration des demandeurs.

20. That the Court will grant the defendants act of their declaration of the decease of one of the defendants, but not that part of their motion which prays that all proceedings be suspended until a *reprise d'instance* shall be made.

Bank of British North America vs. Cuvillier.

495

PROCEEDINGS.—*Vide PRACTICE.*

PROFITS.—*Vide INSURANCE.*

PROMISSORY NOTE.—*Vide NOVATION.*

PROMISSORY NOTE.—INDORSEMENT.—CONDITION.—EVIDENCE.

1. Held :—10. That the order of signatures by indorsement upon a note is a mere presumption of the undertakings of the indorsers with respect to one another, and that this presumption may be destroyed by proof of a contrary understanding or covenant.

20. That, in the case submitted, the indorsation made by one of the indorsers with the express condition that such indorsement would be preceded by the indorsement of a third party, who was made acquainted by the bearer of the note of the condition of this indorsement, cannot give to such third party a right of action against such indorser; the bearer of the note (who was the maker) being considered, in such case, as the agent of such indorser.

Day and Sculthorpe.

20. Que la Cour donnera acte aux défendeurs de leur déclaration du décès de l'un des dits défendeurs, mais non de cette partie de leur motion qui demande que toute procédure soit suspendue jusqu'à ce que l'instance ait été reprise.

Jugé :—10. Que l'ordre des endossements sur un billet n'est qu'une présomption des engagements successifs des endosseurs les uns à l'égard des autres, et que cette présomption peut être écartée par la preuve d'un entendement ou convention contraire.

20. Que, dans l'espèce, l'endossement inscrit par un des endosseurs avec la condition expresse que cet endossement serait précédé par l'endossement d'un tiers, qui a su par le porteur du billet la condition de cet endossement, ne peut donner à ce tiers un droit d'action contre tel endosseur; le porteur du billet (qui était le signataire même) devant être considéré, dans ce cas, comme le mandataire de cet endosseur.

269

Indorsement.—Evidence.—Forgery.—Affidavit.

2. In an action against an endorser, the defendant pleaded by exception that the signatures endorsed on the notes were not his signature, and were not written thereon with his knowledge, consent or authority, and that he was not aware of the existence of the notes, until notified of the protest; he also pleaded a *défense au fonds en fait*, and at the bottom of the pleas there was an affidavit of the defendant, that all the facts articulated therein were well founded.

Dans une action contre un endosseur, le défendeur plaida par exception que les signatures endossées sur les billets n'étaient pas sa signature, et n'y avaient pas été apposées à sa connaissance, de son consentement ou avec son autorité, et qu'il ne connaissait pas l'existence des dits billets, avant la signification du protêt; il plaida aussi une *défense au fonds en fait*, et au bas de ces plaidoyers était un affidavit du défendeur, que tous les faits articulés en iceux étaient bien fondés.

After evidence adduced, it was urged at the hearing of the cause, that under the 87th sec. of the 20 Vict., cap. 44, the plaintiff was entitled to judgment, the affidavit not being in the form required. Upon this, a motion was made by the defendant to discharge the *délibéré*, and to have the cause struck from the roll, and that he be permitted to file the affidavit produced with the motion in support of his pleas.

Held, in the Superior Court, Montréal :—That the motion was inadmissible ; that the right of the plaintiff to have the signatures taken as genuine, and to judgment was a *droit acquis*, and ought not to be interfered with by the Court, the genuineness of the signatures not having been legally put in issue.

In Appeal :—1o. That the affidavit was sufficient.

2o. That the signature indorsed on the notes was not the signature of the appellant, but was forged.

La preuve faite, il fut prétendu lors de l'audition de la cause, que le demandeur devait obtenir jugement en vertu des dispositions de la 87me section de la 20 Vic., Cap. 44, l'affidavit n'étant pas dans la forme voulue. Sur ce motion fut faite par le défendeur pour rayer la cause du rôle, et la retirer du *délibéré*, et qu'il lui fût permis d'enfiler l'affidavit produit avec la motion au soutien de ses plaidoyers.

Jugé, dans la Cour Supérieure, Montréal :—Que la motion était inadmissible ; et que le droit du demandeur de prendre les signatures comme vraies, et d'obtenir jugement était un droit acquis, quant auquel la Cour ne devait pas intervenir, la vérité des signatures n'ayant pas été légalement révoquée en doute.

En appel :—1o. Que l'affidavit était suffisant.

2o. Que la signature endossée sur les billets n'était pas la signature de l'appellant, mais était contrefaite,

Browne and Dow.

273

Indorsement.—Protest.—Parol evidence.

3. In an action against the payee and indorser of a promissory note indorsed in blank, the defendant pleaded: 1o. The insufficiency of the presentment and protest. 2o. That when the plaintiff took the note, it was under an agreement to release the defendant from all liability, and that the defendant put his name on the note simply to convey it to the plaintiff.

Held :—1o. That although the protest was upon its face irregular, the defendant could derive no advantage from the irregularity, having failed to file the affidavit required by the 20th Vict., cap. 44, sec. 87.

2o. That parol evidence could not legally be adduced to prove the agreement that the defendant should incur no liability by reason of his indorsing the note, inasmuch as

Dans une cause contre le faiseur et l'endosseur d'un billet promissoire, endossé en blanc, le défendeur plaida : 1o. L'insuffisance de la présentation et du protest. 2o. Que lorsque le défendeur prit le billet, il fut convenu que le défendeur serait libéré de toute responsabilité, et que le défendeur n'endossait le billet seulement pour le transporter au demandeur.

Jugé :—1o. Que quoique le protest à sa face fut irrégulier, le défendeur ne pouvait tirer aucun avantage de cette irrégularité, ayant omis de produire l'affidavit requis par la 20me Vict., chap. 44, sec. 87.

2o. Que témoignage oral ne pouvait être produit pour prouver la convention que le défendeur n'encourerait aucune responsabilité en raison de son endossement du billet,

such evidence tends to vary and defeat a contemporaneous written contract.

30. That the judgment of the Court below, being founded upon the irregularity of the protest, and on such parol evidence, must be reversed.

Chamberlin and Ball.

en autant que tel témoignage aurait l'effet de détruire un contrat par écrit.

30. Que le jugement de la Cour inférieure, étant fondé sur l'irrégularité du protêt, et sur tel témoignage oral, devait être infirmé.

50

PROPRES.—*Vide* AMEUBLISSEMENT.

PROTEST.—*Vide* PROMISSORY NOTE.

PROTHONOTARY.—*Vide* FEES.

PUBLIC BRIDGES.—*Vide* CONVICTION.

PUBLIC SCHOOLS.—*Vide* STUDENTS.

RATE.—*Vide* SCHOOL COMMISSIONERS.

RATIFICATION.—*Vide* VENTE.

REALISATION.—*Vide* AMEUBLISSEMENT.

RE-ARREST.—*Vide* CAPIAS.

REPORT OF ARBITRATORS.—*Vide* ARBITRATORS.

REPRESENTATIONS.—*Vide* INSURANCE.

RESCISION.—*Vide* BAIL.

RESPONSIBILITY FOR COLLISION.—*Vide* COLLISION.

RESPONSIBILITY OF GUARDIAN.—*Vide* GUARDIAN.

REVENDEICATION.—*Vide* EVIDENCE.

RIPARIAN PROPRIETORS.—RIGHTS OF,—COSTS.

The parties were respectively riparian proprietors of lands divided by the river Beauport; in 1850 the plaintiff built a wharf upon his property; in october 1852 the defendant also built a wharf upon his property, upon which, in the said month of October, the plaintiff brought his action claiming: 10. damages, 20. the suppression of the wharf erected by the defendant.

Held:—10. That if, in the case submitted, the erection of the wharf by the defendant was such as to cause damages to the plaintiff, he had suffered none at the time of the institution of his action.

Les parties étaient toutes deux propriétaires riverains de terrains séparés par la rivière Beauport; en 1850 le demandeur construisit un quai sur sa propriété; en octobre 1852 le défendeur en fit autant de son côté, sur quoi, dans le même mois d'octobre, le demandeur porta son action réclamant: 10. des dommages, 20. démolition du quai construit par le défendeur.

Jugé:—10. Que si, dans l'espèce, la construction du quai du défendeur était de nature à causer au demandeur des dommages, il n'en avait éprouvé aucun lorsqu'il introduisit son action.

20. That the demand claiming the suppression of the defendant's wharf, could only be sustained upon proof that the wharf had been erected, in whole or in part, on the bed of the river.

30. That a riparian proprietor has a right to protect his property, and to reclaim by the construction of wharves, or otherwise, what may have been encroached upon by the waters; provided the exercise of this right causes no change in the course of the river which may be prejudicial to his neighbor.

40. That were an attorney, party in a cause, appears in person, he is not entitled to recover fees from his adversary.

20. Que la demande en démolition du quai du défendeur ne pouvait être admise qu'en autant qu'il serait établi que ce quai avait été construit, en tout ou en partie, sur le lit de la rivière.

30. Que tout propriétaire riverain a droit de protéger les rives de son héritage, et de reconquérir par la construction de quais, ou autrement, ce que l'action des eaux lui a enlevé; pourvu que l'exercice de ce droit n'apporte au cours des eaux aucun changement préjudiciable au voisin.

40. Que lorsque un procureur, partie dans une cause, comparait en personne, il n'a pas droit de recouvrer ses honoraires contre son adversaire.

Brown and Gagy.

401

ROAD WORK.—*Vide MUNICIPALITY*

SAISIE-ARRET.—GARNISHEE.

Held:—That a *tiers-saisi* with whom the defendant had deposited promissory notes in his favor, will be ordered to deliver up the notes into the hands of the prothonotary of the Court.

Jugé:—Qu'un tiers-saisi entre les mains duquel un défendeur a déposé certains billets promissaires en sa faveur, sera contraint de remettre ces billets entre les mains du protonotaire de la Cour.

McKay vs. Demers and Fauteux.

284

SAISIE-GAGERIE.—*Vide SEPARATION DE CORPS ET DE BIENS.*

SALE.—*Vide VENTE.*

SALE OF LANDS.—*Vide MUNICIPALITY.*

SAVINGS' BANK.—DEPOSITORS IN,—ACTION AGAINST DIRECTORS OF,—LIABILITY.

A charitable institution, formed for the relief of the poor, appointed delegates to establish a Savings' Bank. These delegates elected a president and directors who adopted certain regulations, and among others, one prohibiting any profit to the officers of the institution.. Deposits were received, to be repaid with interest, and promissory notes were discounted upon the credit of individuals. Upon these discounts a *per centage* was taken by the directors, and a portion of the

Une institution charitable, formée pour secourir les pauvres, nomma des délégués pour établir une Banque d'Epargnes. Ces délégués élurent un président et des directeurs qui adoptèrent certains réglemens, et entr'autres un règlement interdisant tout profit aux officiers de l'institution. Des dépôts furent reçus pour être remboursés avec intérêt, et des billets promissaires escomptés sur la responsabilité personnelle des individus. Sur ces escomptes un *per centage* fut perçu

funds was appropriated to their own use for their services. The bank or business, so established, was ultimately closed, as being insolvent, and a portion of the debts, due as special deposits, were bought up by the directors at a composition in the pound.

Held :—In an action of *assumpsit* against the president and several of the directors, brought by one of the depositors, who had been one of the above mentioned delegates, for the full amount of his deposits :

1o. That, without reference to the question of fraud, *délit* or *quasi délit*, the president and directors had become traders by mixing themselves up with a commercial banking business, and were, jointly and severally, liable to each depositor, for the amount of his deposits. And that had the plaintiff approved of the proceedings of the directors, submitted annually at meetings of the depositors, his approval, obtained by means of false statements, could not operate to his prejudice.

2o. That the charitable institution had no interest in the matter, and consequently that no action of account, *pro socio*, for or against it would lie.

3o. That the president and directors had become a copartnership, or an unincorporated company, and that the action was properly brought against any one or more of them, under the provisions of the 12 Vict., ch. 45.

Prevost and Allaire.

par les directeurs, et une portion des fonds fut appropriée à leur usage en paiement de leurs services. La banque, ainsi établie, fut finalement close, comme insolvable, et une partie des dettes, dues comme dépôts spéciaux, fut rachetée par les directeurs à tant dans le louis.

Jugé :—Dans une action d'*assumpsit* contre le président et plusieurs des directeurs, intentée par l'un des déposants, qui avait été un des délégués sus-mentionnés, pour tout le montant de ses dépôts :

1o. Que, sans égard à la question de fraude, de délit ou de quasi délit, le président et les directeurs étaient devenus commerçants en s'immiscuant dans une affaire de banque d'une nature commerciale, et étaient, conjointement et solidairement, responsables envers chacun des déposants, pour le montant de ses dépôts. Et que si le demandeur avait approuvé des procédés des directeurs, soumis annuellement aux assemblées des déposants, son approbation, obtenue au moyen d'états faux, ne pouvait opérer à son préjudice.

2o. Que l'institution charitable n'avait aucun intérêt dans la chose, et conséquemment qu'aucune action en reddition de compte ne pouvait être dirigée contre elle.

3o. Que le président et les directeurs étaient devenus une société, ou compagnie non incorporée, et que l'action était bien dirigée contre l'un ou plusieurs d'entreux, en vertu des dispositions de la 12^{me} Vict., ch. 45.

293

SCHOOL COMMISSIONERS.—RATE.—ASSESSMENT.

1. To an action brought to recover £62 10. as "the balance due for building a model school house," under an obligation from school commissioners in favor of the plaintiff and another, his *cédant*; the defendants pleaded in effect that they levied £150 by rate or assessment and received £150 from the Common School fund, making in all £300, which had been paid over to the

Dans une action portée pour recouvrer £62 10. "balance due pour la construction d'une maison d'école modèle," en vertu d'une obligation des commissaires d'école en faveur du demandeur et un autre, son *cédant*; les défendeurs plaideront qu'ils avaient prélevé £150 au moyen d'une cotisation et qu'ils avaient reçus £150 du fond des écoles, faisant en tout £300, qui avaient

plaintiff, and that the commissioners were precluded from levying and expending any further sum, and that the obligation sued upon was inoperative and null.

The clause of the statute (9 Vict., cap. 27, sect. 21, sub-sec. 3.) which defines the duties and powers of school commissioners as to building and repairing school houses etc., contains this provision: "Provided that no rate shall be levied for the building of a Superior or Model School to exceed the sum of £150."

Held:—That the obligation was in excess of the £150, for which sum only the municipality could be assessed and condemned to pay, and was inoperative to bind the defendants.

Adams and The School Commissioners for the Municipality of Barnston.

46

Teachers.

2. Held:—That the Courts will inquire into the sufficiency of the causes of removal of a school master appointed by School Commissioners, notwithstanding the provisions of the 9th Vict., cap. 27, sect. 21, subsec. 4, by which it is enacted, that it shall be the duty of such School Commissioners; "to appoint and engage from time to time school masters and school mistresses duly qualified to teach in the schools under their control, and to remove them on account of incapacity, neglecting faithfully to perform their duties, insubordination, misconduct or immorality, after mature deliberation at a meeting of commissioners called for this purpose;" and that such removal by the commissioners is not conclusive before the Courts.

été payés au défendeur, et que les commissaires ne pouvaient soit prélever ou dépenser une plus forte somme, et que l'obligation était nulle et de nul effet.

La clause du statut (9 Vic., ch. 27, sec. 21, sous-sec. 3.) qui définit les devoirs et les pouvoirs des commissaires d'écoles en autant qu'il s'agit de la construction et réparation de maisons d'écoles etc., contient ce *proviso*: "Pourvu toujours qu'il ne sera prélevé aucune taxe pour la construction d'une Ecole Modèle ou Supérieure excédant £150."

Jugé:—Que l'obligation excédait la somme de £150, pour laquelle seule la municipalité pouvait être cotisée et condamnée à payer, et était de nul effet quant aux défendeurs.

Jugé:—Que les tribunaux s'enquerront de la suffisance des causes du renvoi d'un instituteur nommé par des commissaires d'écoles, nonobstant les dispositions de la 9me. Vict., ch. 27, sect. 21, sous-sec. 4, par laquelle il est statué, qu'il sera du devoir de tels commissaires d'écoles; "de nommer et engager de temps à autre des maîtres ou maîtresses d'écoles suffisamment qualifiés pour enseigner dans les écoles les sous leur contrôle, et de les déplacer pour cause d'incapacité, de négligence à remplir fidèlement leurs devoirs, d'insubordination, d'inconduite ou d'immoralité, après mûre délibération d'une assemblée des commissaires convoquée spécialement à cet effet:" et que tel renvoi par les commissaires n'est pas concluant devant les tribunaux.

Gaudry vs. Marcotte.

486

SCHOOL MUNICIPALITY.

Held:—1o. That a certain surrender by the Royal Institution for the advancement of learning to the school

Jugé:—1o. Qu'un certain abandon par l'Institution Royale pour l'avancement des sciences à la mu-

municipality of the Town of William Henry, in 1851, of a lot of land within the territorial limits of the parish of Sorel, was null and void; and that a new surrender must be made in favor of the plaintiffs.

20. That under the 9th Vict., chap. 27, the various school municipalities had a right to obtain a surrender from the Royal Institution of the lands held by the institution in trust for school purposes within their respective municipalities; that the municipality of the parish of Sorel and that of the Borough of William Henry formed but one municipality for school purposes, and that a separation or division of school municipalities took place under the 12th Vict., chap. 50, without any settlement as to the division of the lot by the school commissioners being provided thereby, in the act as to such division.

30. That the surrender ought to have been made to the school municipality, within whose limits the lot was situate.

The School Commissioners of St. Pierre de Sorel vs. The School Commissioners of William Henry.

68

SEAMEN'S WAGES.—JURISDICTION.—CONVICTION.

1. In an action for wages as a sailor on board a barge.

Held:—10. That the Inspector and Superintendent of Police for the city of Montreal has the same powers as two Justices of the Peace.

20. That as seamen have a *lien* and a right *in rem* for their wages, the registered owner was liable for wages accrued up to the date of his purchase.

30. That, moreover, the applicant was bound to have set forth in his plea the name of the party from whom he bought the barge.

40. That the defect in the summons which set forth that the barge was duly registered in the *province of Canada*, was cured by the conviction which stated the barge to be duly registered in Lower Canada.

municipalité scolaire de la ville de William Henry, en 1851, d'un terrain dans les limites territoriales de la paroisse de Sorel, était nul; et qu'un nouvel abandon devait être fait en faveur des demandeurs.

20. Qu'aux termes de la 9me Vict. chap. 27, les diverses municipalités scolaires avaient droit d'obtenir un abandon de l'Institution Royale des terrains tenus par cette institution en fidéicommiss pour les objets scolaires dans leurs municipalités respectives; que la municipalité de la paroisse de Sorel et celle du Bourg de William Henry ne formaient qu'une municipalité pour les objets scolaires, et qu'une séparation ou division des municipalités scolaires eut lieu sous la 12me Vict., chap. 50, sans aucune disposition quant à la division du terrain par les commissaires d'écoles.

30. Que l'abandon eut dû être fait à la municipalité scolaire, dans les limites de laquelle le lot était situé.

Dans une action pour gages par un matelot à bord d'une barque.

Jugé:—10. Que l'inspecteur et surintendant de police pour la cité de Montréal a les mêmes pouvoirs que deux juges de paix.

20. Qu'en autant que les matelots ont un gage et un droit *in rem* pour leurs gages, le propriétaire sur le registre était responsable pour gages échus jusqu'au jour de son acquisition.

30. Que, de plus, le requérant était tenu d'alléguer dans son plaidoyer le nom de la personne de laquelle il avait acheté la barque.

40. Que la défectuosité dans la sommation qui alléguait que la barque avait été dûment enregistrée dans la province du Canada, était écartée par la conviction que constatait que la barque avait été dûment enregistrée dans le Bas-Canada.

Owner of vessel.

2. Held:—That an advancer under the act to encourage ship-building, 19 Vic., cap. 50, to whom the register of the vessel has been granted, is not, therefore, necessarily to be deemed the owner of such vessel, so as to be liable for the wages of the seamen engaged in navigating it, or of the mechanics employed in completing or repairing it.

Dickey and Terriault.

Jugé:—Qu'un fournisseur en vertu de l'acte pour encourager la construction des navires, 19me Vic., chap. 50, auquel le registre du navire a été accordé, n'est pas, par cela, nécessairement considéré comme le propriétaire de tel navire de manière à être responsable des gages des matelots naviguant le dit vaisseau, ou des artisans engagés à le compléter ou à le réparer.

150

SEIGNIORIAL RIGHTS.—MILLS.—DAM.—DAMAGES.

An action was brought by a seignior, setting up his title and right of *banalité*, the concession to one of the defendants of a lot of land in his seignior, with a clause in the deed that no mill of any kind should be erected; that the defendants, co-partners, had built a saw mill on a non-navigable river bordering on the conceded lot, and had erected a dam across the river, by means whereof the waters were thrown back upon the saw mill and grist mill of the plaintiff which had been in use for more than thirty years, thereby impeding the working of the mills and causing great damage.

Conclusion. That it be declared that the defendants had no right to erect the saw mill or any mill, for the demolition of the dam, and in damages.

Held:—That by the statute 20th Vict., cap. 104, the plaintiff was precluded from his conclusions *en démolition*, that he had no right to the exclusive use of the water; and that the defendants were liable for all damages caused by the too great height of the dam, or otherwise—*Expertise* ordered to determine whether the dam and other works caused any damage to the plaintiff, and to value and fix the amount of such damage, if any.

Dans une action portée par un seigneur, alléguant son titre et son droit de *banalité*, concession à l'un des défendeurs d'une terre dans sa seigneurie, avec clause dans le contrat qu'aucun moulin ne serait érigé; que les défendeurs, associés, avaient construit un moulin à scie sur une rivière non navigable avoisinant le terrain concédé, et avait érigé une chaussée sur la rivière, qui faisait refluer les eaux sur le moulin à scie et le moulin à farine du demandeur qui avaient été en opération pendant plus de trente ans, et qui empêchait le fonctionnement des moulins et causait de grands dommages.

Conclusion. Qu'il fut déclaré que les défendeurs n'avaient aucun droit d'ériger un moulin à scie ou aucun autre moulin, que la chaussée fut démolie et les défendeurs condamnés en dommages.

Jugé:—Que par le statut de la 20e Vic., ch. 104, le demandeur n'avait pas droit à des conclusions *en démolition*, qu'il n'avait aucun droit à l'usage exclusif des eaux; et que les défendeurs étaient responsables des dommages causés par la hauteur de leur chaussée, ou autrement—*Expertise* ordonnée afin de constater si la chaussée et autres ouvrages des défendeurs causaient des dommages au demandeur, et pour en estimer le montant, si aucun il y avait.

Pangman vs. Bricault dit Lamarche.

76

SEPARATION DE BIENS.—EVIDENCE.

Held :—That in an action against a married woman described as *séparée de biens*, the production of notarial deeds in which the defendant takes the quality of *femme séparée de biens* from her husband, is not sufficient evidence of such separation, if the separation be denied by the plea.

Wheeler vs. Burkitt.

Jugé :—Dans une action contre une femme mariée alléguée être *séparée de biens*, que la production d'actes notariés dans lesquels la défenderesse s'était qualifiée de femme *séparée de biens* d'avec son mari, n'est pas preuve suffisante de telle *séparation*, si la *séparation* est niée par le plaidoyer.

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SEPARATION DE CORPS ET DE BIENS.—SAISIE-GAGERIE.

Held :—That a writ of *saisie-gagerie* in an action *en séparation de corps et de biens*, issued on the petition of the plaintiff, alleging that she was credibly informed and verily believed that the defendant, to frustrate her action and rights intended to dispose of, and make away with, his estate, debts, property and effects; the said writ of *saisie-gagerie* so issued by order of a judge in chambers, "to seize and attach all the debts, property and effects of the defendant, wheresoever the same may be found within this district;" will be declared good and valid.

Idler vs. Clarke.

Jugé :—Qu'un writ de *saisie-gagerie* dans une action en *séparation de corps et de biens*, émané sur requête de la demanderesse, alléguant qu'elle était informée et croyait vraiment que le demandeur, pour frustrer son action et ses droits avait l'intention de disposer et de se défaire de ses biens, dettes et effets; le dit writ de *saisie-gagerie* émané sur l'ordre d'un juge en chambre, "pour saisir gager toutes les dettes, biens et effets du défendeur, en quelque lieu qu'ils se trouveraient dans ce district;" sera déclaré bon et valable.

490

SHERIFF.—FEES.—LIEN.

Under a writ of *saisie revendication* the sheriff seized certain moveables in the possession of the defendant, which moveables were, on the petition of the plaintiff, before the return of the writ, sold by the sheriff, and the proceeds thereof, £208 18 5, returned into Court. Part of this sum was paid by order of the Court to an intervening party, as privileged creditor of the defendant, and the balance, £84 2 7, remained in the sheriff's hands. The parties plaintiff and defendant afterwards entered into a settlement before notaries, by which the plaintiff agreed to withdraw his suit, and all matters in dispute between them were put an end to.

Dans une action en *revendication* le shérif saisit certains meubles dans la possession du défendeur, lesquels meubles furent, sur requête du demandeur, avant le rapport du writ, vendus par le shérif, et le produit d'iceux, £208 18 5, rapporté en cour. Partie de cette somme fut payée par ordre de la cour à un intervenant, comme créancier privilégié du défendeur, et la balance, £84 2 7, resta entre les mains du shérif. Subséquentment les parties à l'action transigèrent par devant notaires, par la transaction le demandeur s'obligea de retirer son action, et toutes matières en litige entre les parties furent finalement réglées.

Upon this, judgment was rendered putting the parties out of Court, without costs.

The defendant then brought his action against the sheriff for the £84 2 7, and the sheriff brought into Court and deposited £9 19 11, which he tendered to the plaintiff as the balance of the monies in his hands, after deduction of his costs and disbursements, as well on the execution of the writ of *revendication*, as on the sale of the moveables.

Held:—10. That the sheriff had the right to deduct all necessary expenses incurred by him upon the sale of the goods.

20. That the parties having based their settlement upon the sheriff's return, and not having contested it, the return would be held good, and the parties having agreed that the *saisissant* should withdraw his action, each party paying his own costs, the *saisi* transferring whatever right he had in the goods to the *saisissant*, he the *saisi* could not afterwards, as plaintiff, recover from the sheriff more than the sum tendered.

Seemble: That the abstract question as to whether the sheriff had, or had not, a right of *retention* or *lien* upon property seized *en revendication* where the action is dismissed, was not to be considered as decided upon the appeal.

Quentin dit Dubois and Boston.

SHERIFF'S TITLE.—ADJUDICATAIRE.

Held:—10. That the title granted to an *adjudicataire* at sheriff's sale, at a period subsequent to the adjudication, has a retroactive effect, and confers upon such *adjudicataire* the right of property and all the advantages resulting from it, from the day of the adjudication.

20. That, in the case submitted, there was sufficient proof of the use and occupation by the respondent of the property adjudicated to the appellant.

Laterrière and Houde.

Sur ce, jugement fut rendu mettant les parties hors de cour, sans frais.

Le défendeur porta alors son action contre le shérif pour la somme de £84 2 7, et le shérif rapporta en cour et déposa £9 19 11, qu'il offrit au demandeur comme la balance des argents entre ses mains, après déduction de ses frais et déboursés, tant sur l'exécution du writ de *revendication*, que sur la vente des meubles.

Jugé:—10. Que le shérif avait droit de déduire tous frais nécessaires encourus par lui sur la vente des effets.

20. Que les parties ayant basé leur transaction sur le rapport du shérif, et ne l'ayant pas contesté, le rapport devait être maintenu, et les parties étant convenues que le demandeur retirerait son action, chaque parties payant ses frais, le *saisi* transportant tout droits qu'il pouvait avoir au *saisissant*, il, le *saisi*, ne pouvait par après, comme demandeur, recouvrer du shérif plus que la somme offerte.

Il semble: Que la question de savoir si le shérif avait, ou n'avait pas, un droit de gage ou de *retention* sur les effets saisis et revendiqués, lorsque l'action est renvoyée, ne devait pas être considérée comme décidée sur l'appel.

367

Jugé:—10. Que le titre accordé à un *adjudicataire* sur vente par décret, à une époque subséquente à l'adjudication, a un effet *rétroactif*, et confère à tel *adjudicataire* le droit de propriété et tous les avantages qui en résultent, à compter du jour de l'adjudication.

20. Que, dans l'espèce, il y avait preuve suffisante de l'usage et occupation par l'intimée de la propriété adjugée à l'appellant.

449

SLANDER.—*Vide* PLEADINGS.

SOLIDARITÉ.—*Vide* GARANTIE.

SPECIAL MORTGAGE.—*Vide* MORTGAGE.

STUDENTS.—PUBLIC SCHOOLS.—TAXES.

Held :—1o. That students in public schools are exempt from the capitation tax, and that the corporation of the city of Quebec have simply the power to extend this exemption to other classes of the citizens, but not to deprive such students of its benefit.

2o. That the corporation has the right to increase the capitation tax from 2s. 6d. to 5s.

3o. That the Laval University is a public school, and, as such, entitles its students to all the immunities and privileges granted to students in public schools.

4o. That a law student studying at the University, and also under indentures to an advocate, cannot be deprived of his privileges and immunities as a student in a public school.

Jugé :—1o. Que les étudiants dans les écoles publiques sont exempts de la taxe de capitation, et que la corporation de la cité de Québec a seulement le pouvoir d'étendre cette exemption à d'autres classes de citoyens, sans pouvoir priver tels étudiants de l'avantage de telle exemption.

2o. Que la corporation a le droit d'augmenter cette taxe d'un écu à une piastre.

3o. Que l'Université-Laval est une école publique, et, comme telle, donne droit à ses étudiants aux privilèges et immunités accordés aux étudiants d'écoles publiques.

4o. Qu'un étudiant en droit à l'Université-Laval, et en même temps sous brevet à un avocat, ne peut être privé de ses privilèges et immunités comme étudiant dans une école publique.

Ex parte—Bourdages.

457

SUPERIOR COURT.—*Vide* PRIVY COUNCIL, DECREE OF.

SUPPLY OF WATER.—*Vide* WATER TAX.

TAX.—ASSESSMENTS.—TENANT.

Held :—That a tenant who is bound to pay "assessments," is bound for the special tax or rate imposed under the 22 Vict., ch. 15.

Berthelet vs. Muir.

Jugé :—Qu'un locataire qui est tenu de payer les "cotisations," est tenu de fournir la taxe spéciale imposée sous la 22me Vict., ch. 15.

492

TAXATION OF WITNESS.—*Vide* WITNESS.

TAXES.—*Vide* STUDENTS.

TEACHERS.—*Vide* SCHOOL COMMISSIONERS.

TENANT.—*Vide* TAX.

TRANSACTION.—*Vide* PACTE COMMISSOIRE.

TRINITY HOUSE.—*Vide* BRACHES.

TUTOR.—POWERS OF,—*Vide* BANK STOCK.

VENTE.—AUTORISATION.—RATIFICATION.—DOMICILE.

Held :—1o. That husband and wife domiciliated and married in Lower-Canada are regulated in their relations as such by the law of Lower-Canada, even though they should fix their residence in a foreign country.

2o. That a sale by a woman so married, jointly with her husband, but without statement of authority on his part, made in the state of New-York, where no such authority is required, of immovables situate in Lower-Canada, is absolutely void, as well under the Law which regulates personal rights and governs the rights of the wife, as under the Law with respect to realty governing the sale of immovables.

3o. That a subsequent ratification under the authority of the husband, cannot give validity to such a sale, and only effects a transfer of the property from the date of such ratification.

Laviolette and Martin.

Jugé :—1o. Que des époux domiciliés et mariés dans le Bas-Canada sont régis dans leurs relations comme tels par la loi du Bas-Canada, lors-même qu'ils vont s'établir à l'étranger.

2o. Que la vente par la femme ainsi mariée, conjointement avec son mari, mais sans mention d'autorisation de ce dernier, faite dans l'Etat de New-York, où cette autorisation n'est pas requise, d'immovables situés dans le Bas-Canada, est absolument nulle, tant sous le rapport du statut personnel qui régit la personne de la femme, que sous le rapport du statut réel quant à l'aliénation des immeubles.

3o. Que la ratification subséquente, avec l'autorisation du mari, ne peut valider une semblable vente, et n'a l'effet d'aliéner la propriété que du jour de telle ratification.

254

VERDICT.—INTERPRETATION OF,—PAYMENT.

1. Held :—1o. That a verdict rendered by a jury in a civil cause in terms which in a grammatical sense are ambiguous, may be interpreted by the Court in such way as to give it effect, and that the Court may for that purpose look to the evidence, and ascertain the interpretation which one of the parties has given to the expressions which are the cause of the apparent ambiguity of the verdict.

2o. That a creditor in possession of money belonging to a third party, cannot apply them to the payment of a promissory note upon which such third party appears as indorser, if such note has been retired by the maker by means of a check without value.—That the remedy must in such case be by special action.

The Quebec Bank vs. Mazham.

Jugé :—Qu'un verdict prononcé par un jury en matière civile en des termes qui suivant le langage grammatical sont ambigus, peut être interprété par la Cour de manière à lui donner effet, et que pour cet objet la Cour peut s'aider des lumières que lui offre la preuve, et de l'interprétation que la partie elle-même a donné aux expressions qui sont la cause de l'ambiguïté apparente du verdict.

2o. Qu'un créancier en possession de deniers appartenant à un tiers, ne peut les appliquer au paiement d'un billet promissoire auquel le tiers apparaît comme endosseur, si le billet a été retiré par le faiseur au moyen d'un check sans valeur.—Que le seul recours dans ce cas consiste dans une action spéciale.

97

Judgment nonobstante veredicto.—Evidence.

2. Held:—That the verdict of a jury finding that a creditor who, after notice of dissolution by the retirement of one of the partners, continues the business with the new firm, and, upon their becoming insolvent, gives them delay for payment without making reference in any way to the retired partner of the old firm, thereby discharges the old firm and such retired partner thereof, as to the liability of the old firm; will be set aside, and judgment entered for the plaintiffs, *nonobstante veredicto*, if the evidence upon which the said verdict was based was entirely contained in written correspondence, although carried on for a period of two years; if it appear to the Court by the construction to be put upon the letters that there was no intention to discharge the old firm.

Clark vs. Murphy.

Jugé:—Que le rapport d'un jury à l'effet qu'un créancier qui, après avis de la dissolution de société par la retraite de l'un des associés, continue les affaires avec la nouvelle société, et, lors de leur insolvabilité, leur donne du délai sans nullement faire mention de l'associé qui s'est retiré de la première société, libère cette société de toute responsabilité et aussi l'associé qui s'en est ainsi retiré; sera déclaré nul, et jugement sera rendu en faveur des demandeurs, *nonobstante veredicto*, si la preuve sur laquelle tel rapport a été fait résulte entièrement d'une correspondance écrite, nonobstant qu'elle ait duré pendant deux ans; s'il appert à la Cour que par le sens qui doit être donné aux lettres il n'y avait pas d'intention de libérer l'ancienne société.

105

WARRANTY.—*Vide Insurance.*

WATER TAX.—BY-LAW.—SUPPLY OF WATER.

Held:—That the corporation of the city of Quebec cannot make any By-Law imposing a water tax upon any of the wards within the city, until it shall be ready to furnish to the inhabitants of such ward, a continuous and abundant supply of pure and wholesome water.

Ex parte—Dallimore.

Jugé:—Que la corporation de la cité de Québec ne peut faire de règlement pour imposer une taxe pour l'eau dans aucun des quartiers de la cité, avant qu'elle ne soit prête à fournir aux résidents de tel quartier, un approvisionnement régulier d'eau pure et salubre.

436

WILL.—*Vide Delivrance de Legs.—Legacy.*

WILL.—CONSTRUCTION OF,—CHILDREN.—GRAND CHILDREN.—LEGACY.

Held:—That the paramount duty of Courts in construing wills is to ascertain and give effect to the intention of the testator, to be collected from the whole will, and not from any particular word or expression which may be contained in it.

2o. That, in the case submitted, a legacy by which a testatrix made a bequest "to all her children, living at the time of her decease," does not include her grand children,

Jugé:—1o. Que le premier devoir des cours en interprétant un testament est de rechercher et de donner effet à l'intention du testateur, telle qu'elle appert de l'ensemble du testament, et non d'un mot ou d'une expression particulière qui peut s'y trouver.

2o. Que, dans l'espèce, un legs par lequel une testatrice légua "à tous ses enfants, vivants lors de son décès," ne comprend pas ses petits enfants, issue de l'un de ses

issue of one of her children who died before the making of the will.

Seem.—That a more extensive signification is frequently given by the old french law which prevails in Canada to the word "enfants" than is generally given by the english law to the word "children."

enfants décédé avant l'exécution du testament.

Il semble.—Qu'une signification plus étendue est fréquemment donnée par l'ancien droit français qui est en force en Canada au mot "enfants" que n'est généralement donné par la loi anglaise au mot "children."

Martin and Lee.

84

WITNESS.—*Vide* EVIDENCE.—PLEADINGS.

WITNESS.—TAXATION OF,—RIGHT TO RECOVER.

Held :—That a witness summoned to give evidence in a cause wherein the defendant was a party, in his quality of tutor to a substitution, cannot recover the amount of his taxation in an action brought against the tutor personally.

Jugé :—Qu'un témoin sommé pour rendre témoignage dans une cause dans laquelle le défendeur était partie, en sa qualité de tuteur à une substitution, ne peut recouvrer le montant de sa taxe dans une action portée contre le tuteur personnellement.

Dagenais vs. Gauthier.

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WOMAN SEPARÉE DE BIENS.—*Vide* CONTRAINTE PAR CORPS.

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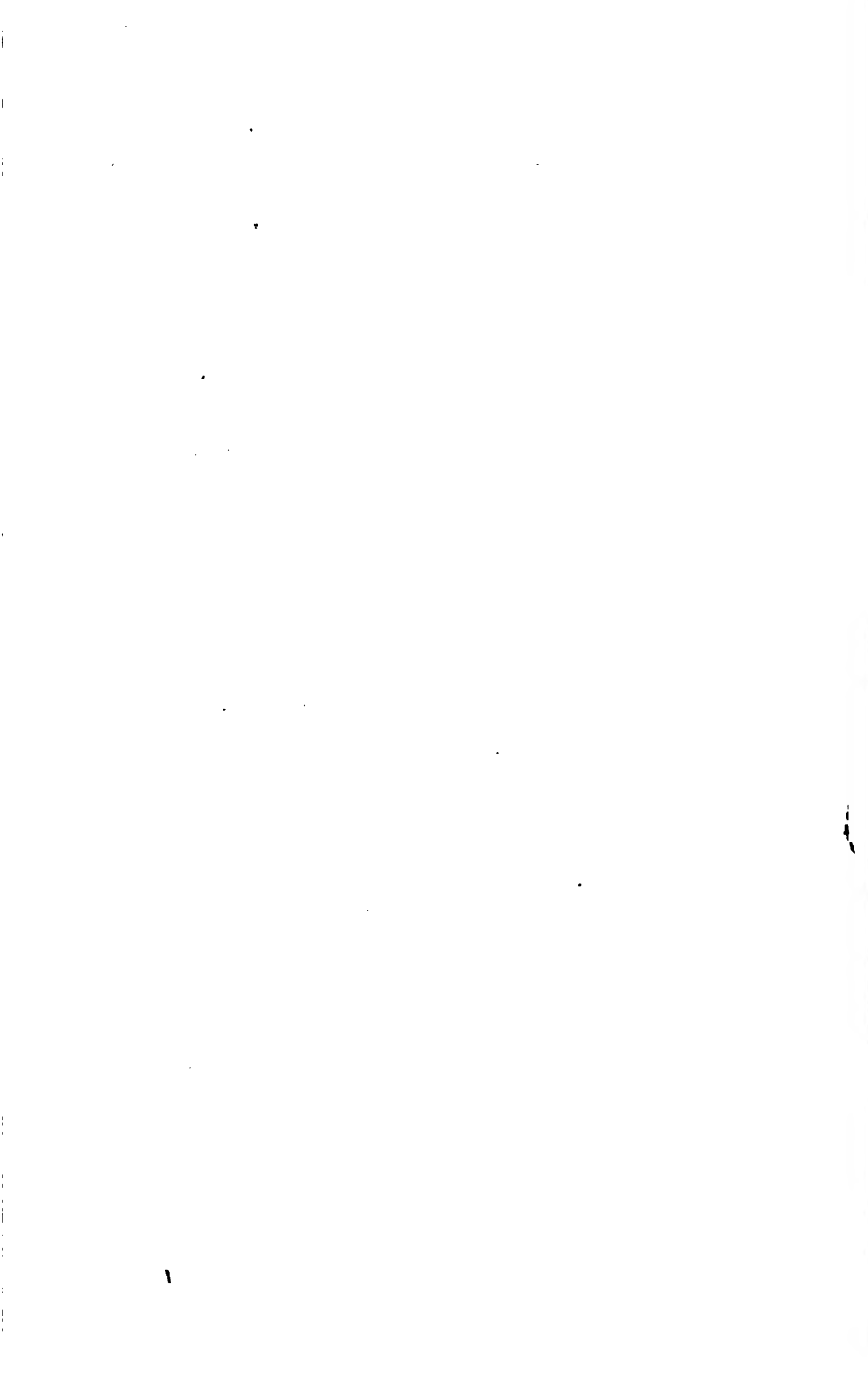
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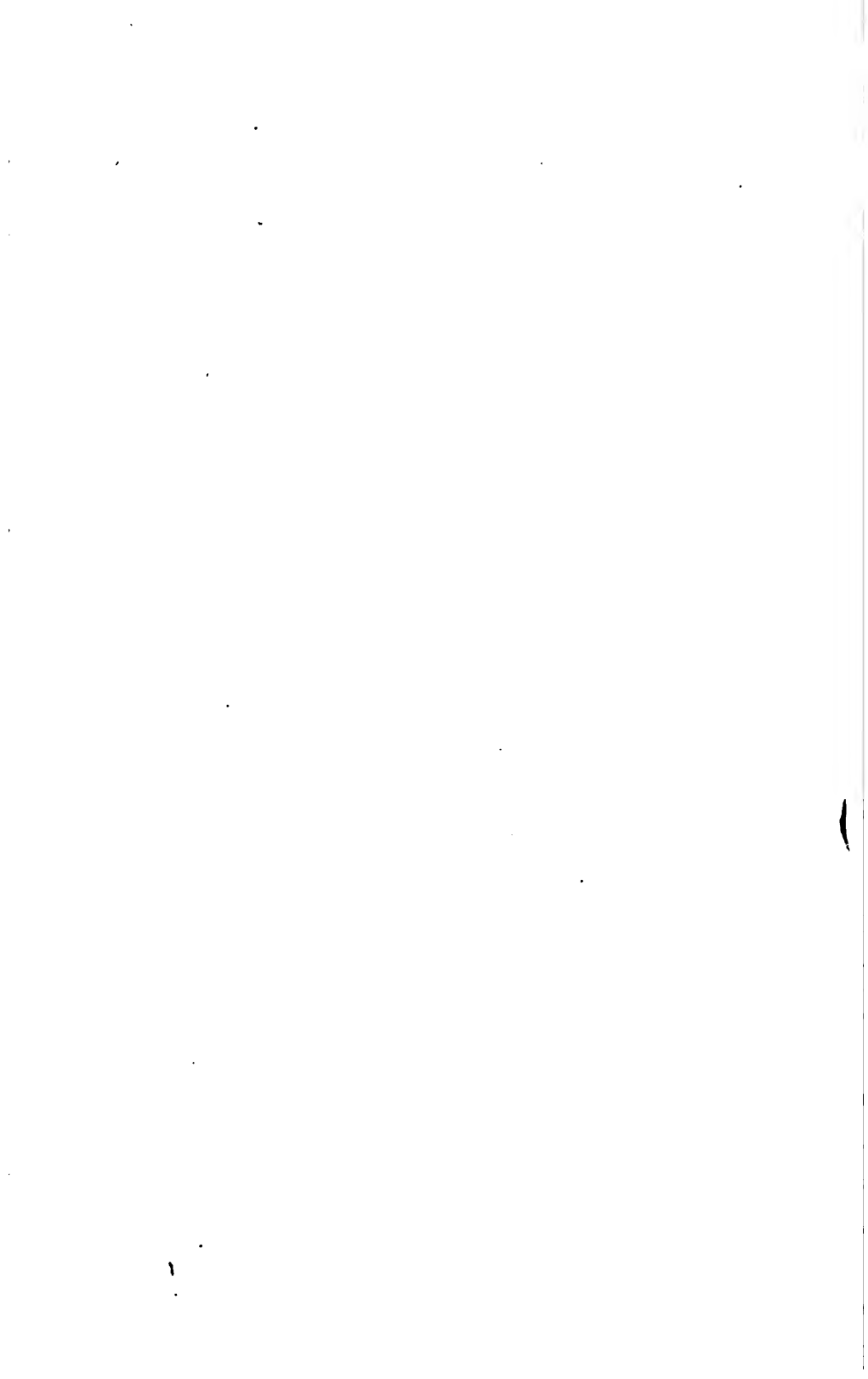
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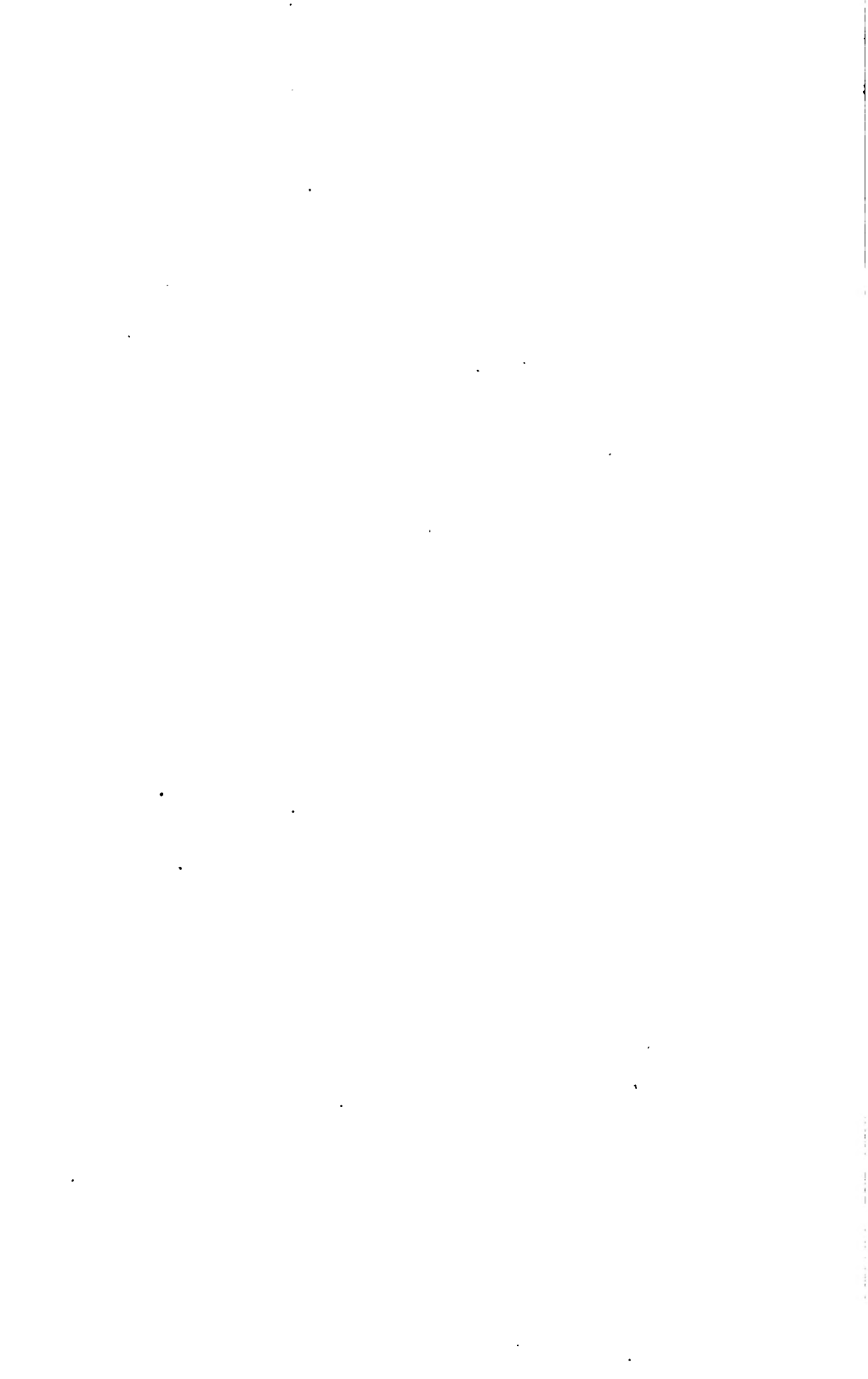
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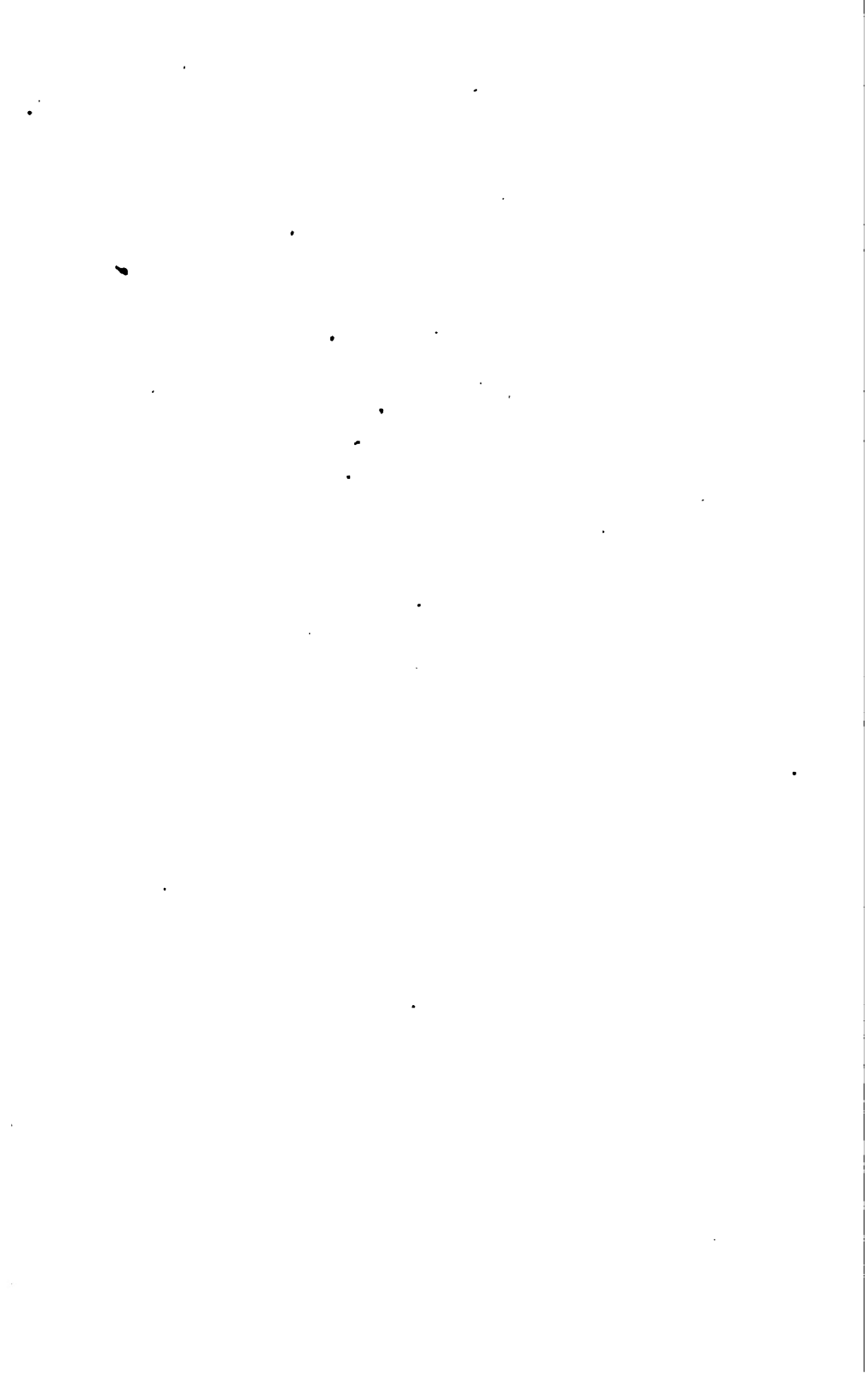
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